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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CABRIOLET PORSCHE + AUDI, INC.,
Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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FEBRUARY 27, 1986

QUESTIONS PRESENTED

1. Does the fact that a Japanese automobile manufacturer may control the number of automobiles it delivers to its wholly owned, exclusive United States distributor insulate the distributor from liability under the federal Automobile Dealers' Day in Court Act ("the Act"), state statute, and its written agreements for the distributor's use of an unwritten allocation system to coerce and intimidate a non-exclusive dealer into establishing an exclusive dealership or selling its franchise under the threat of non-renewal of the franchise agreement?

2. Did the court of appeals overstep its function in reversing the factual determinations that the district court made after hearing conflicting testimony and upon which it based its conclusion

that agents of the defendant automobile distributor had acted to coerce and intimidate the plaintiff automobile dealer in violation of the "good faith" requirement imposed upon the distributor by the Act?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

CABRIOLET PORSCHE+AUDI, INC.,
a Florida Corporation,
d/b/a CABRIOLET HONDA CAR,

Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
a California Corporation,

Respondent.

PETITION

Cabriolet Porsche+Audi, Inc., petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment by which that court reversed a judgment the district court had entered in petitioner's favor.

OPINIONS BELOW

The opinion of the court of appeals is reported as Cabriolet Porsche Audi,

Inc. v. American Honda Motor Co., Inc., 773 F.2d 1193 (11th Cir. 1985), and is set out in the appendix to this petition at A. 1-80. The district court's findings of fact and conclusions of law are not reported, but are set out in the Appendix at A. 81-148.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 15, 1985 (A. 149). On December 18, 1985, the Honorable Lewis F. Powell, Jr., entered an order as Circuit Justice extending the time within which a petition seeking review of that judgment could be filed until February 27, 1986. This petition was filed on that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS

This case involves provisions of the federal Automobile Dealers' Day in

Court Act, 15 U.S.C. §§ 1221-1225 (1982), and of Rule 52(a) of the Federal Rules of Civil Procedure. The relevant provisions of the act and the rule are set out in the appendix at A. 155-61.

STATEMENT OF THE CASE

Nature of the Action

This was an action by an automobile dealer against the wholly owned, domestic distributor of a major foreign automobile manufacturer. In 1978, the dealer had agreed to purchase a non-exclusive dealership for 1.6 million dollars, with $400,000 allocated as the price for the assets and good will associated with the seller's Honda franchise. The sale was conditioned upon obtaining the approval of the distributor. Because the seller had established a miserable reputation as a Honda dealer, the distributor's representatives welcomed the dealer's application

and assured it that it could continue to sell Honda cars on a non-exclusive basis from the seller's facility, at least until its volume increased from a projected minimum of 20-22 cars per month to a volume of 65-75 cars per month. The standard written dealer agreements tendered by the distributor were specific as to a dealer's duties, but vague in defining its rights. The written agreements had only a one-year term.

By spring 1979, the dealer had dramatically reversed the reputation of the dealership. At that time the demand for fuel-efficient cars increased, also dramatically. The distributor's representatives promptly sought to use the leverage created by this demand to sanction the dealer into complying with their demand that it make a substantial additional investment in order to establish a separ-

ate facility for Honda sales and service. Without regard to their prior assurances, they reduced the number of cars delivered to the dealer. They refused to commit to an allocation that the dealer could expect if it complied with their demands.

When the dealer resisted the demands and challenged the conduct of the representatives, the distributor refused to renew the dealer agreements after October 1979. In May 1980, after resisting the distributor's demands for an additional seven months, the dealer sold the assets and good will to a more compliant purchaser for what it had originally paid. The dealer received no compensation for the increase in the value of the franchise resulting from the improved reputation or the change in market conditions.

In the district court, the dealer claimed that the distributor's represent-

atives had never disclosed the existence of an allocation system at any time prior to the purchase or during the period when the market was soft and the available supply exceeded the demand. The dealer also claimed that the system and the manner in which it had been applied to the particular dealer were unreasonable and violated the agreements between the parties.

The dealer claimed that the distributor had acted to coerce and intimidate the dealer through its representatives' attempts to force the dealer to establish a separate facility devoted exclusively to selling and servicing the distributor's cars. According to the dealer, when the distributor was unable to starve the dealer into submission through its application of its alleged allocation system, it refused to renew the dealership agree-

ment in order to compel compliance or force the dealer to sell its franchise. By these acts, the dealer claimed that the distributor had violated the duty to act in good faith imposed by the Federal Automobile Dealers' Day in Court Act (the "Act"), 15 U.S.C. §§ 1221, et seq. (1982) by the applicable state statutes, and by the written agreements.

After a seven-day trial and after considering proposed findings of fact and conclusions of law submitted by each of the parties, the district court significantly revised the dealer's proposed findings and conclusions and adopted them as its own. The district court found that the claimed allocation system had not existed and had never been disclosed to the dealer until after its implementation as a sanctioning device. The court concluded that the system was unreasonable

within the meaning of the parties' agreements and that it had been unfairly applied to the dealer. The court found that the distributor's agents had in fact acted throughout to coerce and intimidate the dealer and, on that basis, concluded that the distributor had violated the duty of good faith imposed upon it by the Act. The court also concluded that the distributor had violated the duties imposed by the applicable state statutes and by the parties' agreements.

The court of appeals reversed. It concluded that the distributor had a "restricted supply" at all times solely because its supply was controlled by its foreign parent. Against that background, the court concluded that both the allocation system and the distributor's use of that system against the dealer were not unreasonable. The court of appeals set

aside as clearly erroneous the district court's factual determination that the distributor had coerced and intimidated the dealer. It directed that judgment be entered for the distributor.

The Material Facts

1. The Parties and the Establishment of Cabriolet's Dealership. Respondent American Honda Motor Co., Inc. ("American Honda") is a California corporation and a wholly owned subsidiary of a Japanese automobile manufacturing corporation, Honda Motor Co., Ltd. ("Japan Honda") (A. 5, 82). American Honda is the exclusive distributor of Honda automobiles in the United States (A. 5, 83). By 1978, American Honda was importing well over 300,000 Honda cars a year and distributing them in the United States (A. 97-98). From September 1978 until May 1980, petitioner Cabriolet Porsche+Audi, Inc.

("Cabriolet") was a Honda dealer (A. 6, 16, 82). Throughout that period, Cabriolet operated what is known as a non-exclusive automobile dealership, that is a dealership that sold and serviced automobiles from a single facility that it had purchased from different manufacturers, or their distributors (A. 6, 81).

In June 1978, Cabriolet agreed to purchase the assets of the De Maria Porsche-Audi-Ferrari-Honda dealership ("De Maria") in Miami, Florida for 1.6 million dollars (A. 6, 85-86). Cabriolet's agreement was conditioned upon its obtaining the approvals that were necessary to enable it to continue to operate a non-exclusive dealership from De Maria's established sales and service facility. (A. 6, 85-86). Four hundred thousand dollars was allocated to the good will represented by De Maria's Honda dealership

(A. 86). Cabriolet promptly sought the necessary approval from American Honda as well as the other manufacturers and distributors that De Maria had represented (A. 6, 87).

During the summer of 1978, American Honda had decided to attempt to make all its dealers in South Florida establish exclusive Honda dealerships, that is establish a separate facility devoted exclusively to the sale and service of Honda automobiles (A. 86-87). American Honda's representatives did not, however, disclose that decision when Cabriolet sought approval to take over De Maria's Honda dealership and to continue to operate on a non-exclusive basis from De Maria's single facility (A.94-95). They welcomed Cabriolet's application because American Honda had become dissatisfied with De Maria's performance (A. 93-95).

Indeed, De Maria had received an extraordinary negative rating in a 1977 customer service image rating survey commissioned by American Honda, a survey that showed that other Honda dealers in the area and throughout the nation uniformly had high positive ratings (A. 85). Against that background, American Honda's representatives promptly approved Cabriolet's application and assured Cabriolet that it could continue to sell and could substantially increase the sales of Honda automobiles from its non-exclusive-dealership facility (A. 93-95).

2. American Honda's Dealer Agreements With Cabriolet. Three aspects of the standarized dealers agreements that American Honda entered into with its dealers are material to the questions presented here. First, American Honda established a Minimum Requirements Plan-

ning Volume for each dealer, specifying the minimum number of Honda automobiles that the parties expected the dealer would sell each year (A. 92). Based upon this minimum volume, American Honda prescribed the minimum working capital, equity, credit-lines, sales personnel, and sales and service space and facilities that the dealer would have to maintain and allocate exclusively to support its Honda dealership (A. 92-93).

Second, American Honda agreed to sell and deliver Honda cars and parts to the dealer and to assist it in developing its franchise (A. 88-90). Third, American Honda reserved the right to ration the number of automobiles a dealer could purchase in the event of shortage or restricted supply (A. 89). Specifically, the standard dealer's agreement provided: "In the event of shortage or restricted

supply, Dealer gives Distributor the right to allocate such supply in any reasonable manner Distributor deems fit in any geographical market area" (id.).

Cabriolet took over the De Maria facility in mid-September 1978 and executed American Honda's standard agreements in October (A. 6-7, 88, 99). Cabriolet's minimum planning volume had been established at 264 Honda automobiles per year, and the agreement required Cabriolet to maintain the minimum financial, facility, and personnel requirements American Honda deemed commensurate with that expected minimum sales volume (A. 92-93). The agreements authorized Cabriolet to act as a Honda dealer for one year, through October 1979 (A. 88).

At the time Cabriolet took over the dealership, the available supply of Honda automobiles exceeded the demand (A. 96).

Cabriolet, however, was initially concerned with the negative customer service image De Maria had established for the facility and concentrated its resources on improving the quality of its services rather than the quantity of its sales (A. 104-05). In that it succeeded: the independent customer survey commissioned by American Honda in 1979 showed Cabriolet as the most highly-rated Honda dealer in the region (id.).

The market for fuel-efficient automobiles changed dramatically as a result of the Arab oil embargo in the spring of 1979 (A. 8, 106). Thereafter, the demand for Honda automobiles exceeded the available supply, and American Honda had to allocate that supply among its dealers (A. 9, 106). American Honda's South Florida representative promptly decided to employ an allocation system during the period of excess

demand to provide leverage to implement its exclusive-dealership policy (A. 86,98 For that reason, both the allocation system allegedly employed and the manner in which American Honda applied it to Cabriolet are material to the questions presented by this petition.

3. American Honda's Allocation System. According to American Honda, it adopted what it styled the "Day's Supply System" to allocate each shipment of cars received from Japan among the dealers in the geographical zone supplied from the port or warehouse at which the cars were received. (A. 10-15; cf. A. 95-99).[1] From each shipment, American Honda deduc-

1. American Honda conceded at trial that its allocation system had never been reduced to written form until after Cabriolet had filed the present suit and had sold its Honda dealership in the face of American Honda's refusal to renew its dealer agreement. At trial American

ted a fifteen percent (15%) "holdback" that the distributor allocated at its discretion (id.). (None of the South Dade Honda dealers knew of this "holdback" until it was disclosed pursuant to the dealer's discovery demands in this suit.) The maximum number of cars that each dealer was entitled to receive was computed using the remaining eighty-five percent (85%) as the base figure (id.).

Honda claimed, however, that its agents had explained the system orally to Cabriolet and other dealers. This Cabriolet denied, and the timing and content of the oral disclosures to the dealers were the subject of conflicting testimony at trial as were the effective dates when American Honda adopted and implemented the system (A. 95-99).

On appeal, American Honda proffered a six-page written description of the allocation system as an addendum to its brief. The court of appeals adopted that statement (A. 11). For purposes of understanding the central concerns raised by the first question presented, however, that statement of the allocation system is sufficient.

According to American Honda, after a shipment had been received, it would select an allocation date and a period of days preceding that date, typically forty-four (44) days (A. 10-15). Based upon the number of warranty cards submitted during the selected period, American Honda would calculate each dealer's daily sales rate and the total daily sales rate for all dealers in the zone. (id.). The total daily sales rate would then be divided into the number of cars in the eighty-five percent (85%) pool available for allocation to determine the number of days that the pool could supply cars for the zone at the daily sales rate established during the designated period prior to the allocation date (id.).

According to American Honda, it would then compute the number of cars each dealer would need for the calculated

period based upon the individual daily sales rate established by that dealer (A. 10-15). From that number, American Honda would deduct the number of cars that the dealer had in inventory on the allocation date (id.). The balance represented the maximum number of cars that the dealer was entitled to receive from that shipment (id.).

The illustration supplied by American Honda with its brief on appeal and adopted by the court of appeals illustrates the alleged system clearly (A. 11-13). The illustration assumes that a shipment of approximately 1176 cars had been received, leaving 1000 (or 85%) as the base pool upon which allocation entitlements were calculated.

> "Thus, if there are a thousand cars available for allocation, and the dealers in the involved area have been selling at a rate of 20 cars per day, the 'warehouse' or 'port' has a

> 50-day supply of cars. A dealer with a travel rate of one car per day and an inventory of 20 cars, i.e., a 20-day supply, will be entitled to 30 additional cars, i.e., the warehouse day's supply of 50 minus the dealer's day's supply of 20 multiplied by the dealer's travel rate."

A. 12-13.

Thus, even under American Honda's version, after the allocation had been made, American Honda would control more than the 176 cars in the fifteen percent (15%) holdback pool. It would also control the twenty additional cars that the hypothetical dealer had held in inventory on the allocation date, plus the total number of cars that other dealers in the zone had held in inventory on that date. These would then constitute the discretionary pool that was available to enable American Honda to implement its exclusive-dealer-

ship and other policies.

4. American Honda's Application of the Allocation System to Cabriolet. At the time Cabriolet purchased the De Maria dealership, American Honda's agents assured Cabriolet that it could and should seek to sell 65 to 75 Honda cars per month from its existing facility (A. 93-95, 101-02). They suggested that when its sales volume reached that level, Cabriolet should consider establishing a separate facility for its Honda dealership (id.). They did not, however, disclose American Honda's recently adopted policy against continued operation of non-exclusive dealerships such as Cabriolet's (A. id., 86-87).[2] It was on this basis that Cabriolet made the investment.

2. According to Cabriolet's officers, they also did not disclose the existence or content of any allocation system at

During its first several months of operation, the period of excess supply, Cabriolet sold slightly more than 20 Honda cars per month, an amount consistent with its planning volume (A. 100-03). Thereafter throughout the period it served as a Honda dealer, it continued to meet the monthly sales objective set for it by American Honda (A. 104). It was not until the period of excess demand, however, that American Honda's agents informed Cabriolet that it was in a "Catch-22" situation and that its only hope of escape lay in establishing a separate facility dedicated exclusively to the sale and service of Honda cars (A. 107-08).

After the oil embargo began, Honda dealers in Dade County, Florida, sold all the Honda cars they received, an average

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that time or at any time prior to the spring 1979 (A. 95-99, 106).

of more than 50 new Honda cars a month (A. 103-04). During this period American Honda delivered an average of 15 Honda cars per month to Cabriolet (A. 102-04). In response to Cabriolet's complaints, American Honda's representatives informed Cabriolet for the first time that an allocation system had been in force during the period of excess supply and that Cabriolet was irretrievably locked into the daily sales rate it had established during the allocation periods that occurred during the first months of its dealership (A. 106-08). They refused to allocate additional cars to Cabriolet so long as it remained a non-exclusive dealer (A. 108). They informed Cabriolet that it could seek an increased allocation from American Honda if and only if it established a separate facility dedicated exclusively to the sale and service of

Honda cars (A. 108-11) and suggested one facility that would have required Cabriolet to invest an additional 450 thousand dollars (A. 115-16). They refused, however, to give Cabriolet any firm commitment concerning the number of additional cars that American Honda would allocate to Cabriolet if it made the substantial investment necessary to establish a separate facility for its Honda dealership (A. 109-10, 111, 115-16).

In July 1979, Cabriolet filed the complaint that instituted the present case. In October, American Honda's representatives recommended against renewal of Cabriolet's dealer agreement (A. 121-22). American Honda did not issue a renewal agreement, but it did continue to deliver a small number of Honda cars each month (A. 122, 102-03). The stalemate ended in May 1980 when

Cabriolet agreed to sell its Honda dealership to Norman Braman for the same price it had paid De Maria (A. 122-23). Thereafter, Cabriolet filed the amended complaint on which the present case was tried.

5. The Conflicting Testimony. The trial in the district court lasted seven days. Cabriolet's principal officers testified as did the individuals who had represented American Honda in its dealings with Cabriolet and other South Florida Honda dealers. Representatives of several other dealers testified concerning their conversations and dealings with American Honda and its same representatives. The district court also admitted substantial documentary evidence. The testimony conflicted in two areas that are material to the questions presented here.

First, Cabriolet's president testified that he was not told that a formal

rationing system existed or that any supply restrictions were in effect when he sought approval for the purchase of De Maria's Honda franchise or at any time during the period of excess supply (A. 93-96, 106-08). This Cabriolet's sales manager confirmed (id.). Moreover, both claimed that the American Honda representatives never disclosed the mechanics of the system or the existence of the fifteen percent (15%) holdback (A. 96-98, 106-08). It was undisputed that American Honda did not disclose its purported allocation system in written form until after the present suit was filed and did not disclose the existence of the "holdback" until discovery was well underway (A. 96-98).

Nonetheless, American Honda's representatives claimed that the system had been in effect throughout and that they

had orally explained it to Cabriolet (A. 34-36). That claim was undermined by the conflicting testimony of representatives of other Honda dealers with respect to the timing and content of the oral disclosures they had received from American Honda's representatives, no two of whom described the same system (A. 96-98). The claim was further undermined by evidence showing that, although all dealers appeared to have received at least as many cars as they would have been entitled to receive under the claimed system, some inexplicably received substantially more even without complying with American Honda's exclusive-distributorship policy (A. 111-15).

The second area of dispute focused upon American Honda's application of its purported allocation system to Cabriolet and its decision not to renew Cabrio-

let's dealership after the first year. Again, Cabriolet's and American Honda's witnesses gave conflicting testimony with respect to their conversations concerning American Honda's demand that Cabriolet make the investment necessary to establish an exclusive Honda dealership and concerning the consequences to Cabriolet if it did not (A. 107-10, 115-22). Again, other dealers testified to their dealings with American Honda during the same period (e.g., A. 112-13). And again the district court received evidence showing the number of cars American Honda had in fact allocated to various competing dealers (e.g., id. and A. 119-20). That court also heard conflicting testimony concerning the negotiations that led to Cabriolet's sale of its unrenewed franchise to Norman Braman and received evidence concerning American Honda's subsequent dealings with

the Braman Honda dealership (A. 121-25).

The Proceedings Below

1. The District Court. The district court found as a matter of fact that American Honda had not implemented or communicated its allocation system at the time it approved Cabriolet as a Honda dealer and issued its dealership agreement or at any time prior to the time that the market reacted to the Arab oil embargo (A. 95-96, 106, 126). The court found that the period between September 1978 and spring 1979 was not a period of "shortage or restricted supply" as Cabriolet should have understood those terms in the written agreements (A. 96, 127). The court found that American Honda's representatives intended to coerce and intimidate Cabriolet by their actions in refusing to allocate cars and in refusing to renew the dealership agreements (A. 115, 126-27). The

court found that as a result of these actions, Cabriolet had been damaged in an amount equal to the net profits it would have otherwise realized from its Honda dealership (A. 132-33).

The district court concluded as a matter of law that American Honda's claimed allocation system as applied to Cabriolet, was not a "reasonable" system within the meaning of its written agreements with Cabriolet; and that American Honda had violated the separate duty of good faith imposed by those agreements (A. 139-41). That court also concluded that American Honda, as a result of its agents' acts, had violated the duty of "good faith" imposed upon it by the Act (A. 143-44, 147) and its duties under Florida statutes (A. 142-45). It entered judgment for damages in the amount it had determined Cabriolet had lost as a result

of those violations. (A. 148, 153-54). Both parties appealed.[3]

2. The Court of Appeals. The court of appeals reversed and remanded the case with instructions that a judgment be entered in favor of American Honda (A. 2-3). That court found as a matter of fact that American Honda's "Day's Supply System" had been in effect throughout and had been orally communicated to Cabriolet by American Honda's representatives (A. 10, 22, 33-41). That court concluded as a matter of law that 1978 was a time of "restricted supply" because at all times the supply of Honda cars available to

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3. American Honda also challenged the district court's assessment of damages on appeal. Cabriolet, supported by the Florida Automobile Dealers Association as amicus curiae, challenged the district court's failure to treble the damages pursuant to Florida's statutory counterpart to the Act. Those issues were not addressed by the court below and are not presented here.

American Honda was subject to the control of its foreign parent, Japan Honda (A. 28-29). The court also concluded the allocation system was "reasonable" within the meaning of American Honda's agreements with Cabriolet (A. 50-51).

The court of appeals found that American Honda's agents had not intended to coerce or intimidate by their demands that Cabriolet establish an exclusive dealership backed by their refusals to allocate cars or to commit to increase the number of cars it would receive if it established a separate facility or by their refusal to renew its dealership agreements after Cabriolet had rejected their demands and challenged their conduct [A. 52-55 (summary)]. That court concluded that none of the challenged conduct violated the several duties of good faith imposed by the Act, by state statute, or

by the agreements (A. 55-80).

REASONS WHY REVIEW SHOULD BE GRANTED

The need for review by this Court stems from the substantial mischief that the decision below is likely to cause in two related areas. First, it is likley to have a substantial and general impact upon the relationships between automobile manufacturers and their dealers. It is also likely to have a specific impact upon the practices of foreign manufacturers and the domestic distributors that will give them an advantage, an unfair one in petitioner's view, over domestic automobile manufacturers. At a minimum, the decision below creates uncertainties in a relationship of major economic significance to the Nation that has been governed by the largely settled jurisprudence that has evolved in the state and federal courts over the last thirty years.

Those uncertainties come at a time when the industry can ill afford them. The dramatic increase in the share of the market that has been captured by foreign automobile manufacturers and the adjustments made necessary in the domestic auto industry as a result of that shift and other changes in the economy have created uncertainties enough.

The decision below will also have a general and specific impact upon the lower federal courts and those who seek relief before them. In the present case, the court of appeals thought itself able to determine from an appellate record the subjective intent of the agents who committed the acts that gave rise to the suit below and substituted its determination for that of the district judge who had heard the conflicting testimony.

The opinion makes it clear that the

court below read Anderson v. City of Bessmer City, 105 S. Ct. 1504 (1985), as requiring a symbolic incantation of a prescribed litany rather than as a decision intended to define substantive limitations necessary to preserve the proper distinctions between the appellate and trial functions. The decision's general impact will be to undermine again the integrity and finality of the trial function and to invite litigants to pursue appeals rather than abide or settle fact-bound cases that come before the federal courts.

The decision will have a specific impact upon automobile dealers. By the Act, Congress created the new federal cause of action because it recognized that an automobile dealer ordinarily did not have the resources to challenge giant automobile manufacturers through tradi-

tional legal or economic means. The decision below will encourage automobile manufacturers and distributors to use their superior resources to pursue litigation in the court of appeals or to force dealers to abandon claims or settle them for less than is due. These consequences are not consistent with the objectives of the Act or with the sound administration of justice in the federal courts. Petitioner develops these points below.

A.

The Court should grant review because the decision below will substantially undermine the rights of automobile dealers and will frustrate the proper enforcement of the separate duties of good faith imposed by federal and state laws in the automobile industry.

1. The Act and Its Purpose. Three fully documented findings motivated Congress to adopt the Act. First, Congress found that the concentration of economic power in the automobile industry had created a "manifest disparity in the ability of franchised dealers ... to bargain with their manufacturers." H.R. Rep No. 2850, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Ad. News 4596-4597.[4]

Second, Congress found the manufacturers had abused this dominant position with respect to their dealers. Id. at

4. See also S. Rep. No. 2073, 84th Cong., 2d Sess. 2 (1956).

4597. Three of the specific abuses that Congress identified are present in this case. Congress was specifically concerned by the manufacturers' use of "'agreements that inadequately define the rights and obligations of the parties ...,'" and reports by dealers that they had been subjected "'... to arbitrary requirements ... to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise ....'" Id. at 4598.[5] Congress also found that in many instances the manufacturers had used agreements terminable at will or for a short term coupled with the threat of franchise termination or non-renewal to coerce or intimidate their dealers. Id. at 4598, 4599.

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5. quoting from FTC, Report on Motor Vehicle Industry, H. R. Doc. 468, 76th Cong., 1st Sess. 1075 (1939).

Third, based upon a review of then current court decisions, Congress also concluded that dealers had been unable to obtain proper redress for abuses such as these because "[c]onfronted with express provisions in the dealer's franchise, courts have been reluctant to impose a condition of good faith on the part of the manufacturer." Id. at 4599, 4599-4600 (cases discussed).

Congress adopted the Act as a carefully balanced response intended to eliminate these abuses without impairing competition. The Act imposed its duty of "good faith" upon automobile manufacturers and controlled distributors and agents (as well as their franchised dealers), 15 U.S.C. § 1221 (1982). The Act created a new federal cause of action by which an automobile dealer could recover damages caused by "the failure of said automobile

manufacturer. . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . ." Id. at § 1222. To achieve its limited federal objectives, Congress defined "good faith" between automobile manufacturers and dealers as:

> . . . the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

Id. at § 1221 (e).

Here, the district court found that the distributor's representative had given the dealer oral assurances that it could continue and grow as a non-exclusive

dealer in order to induce the dealer to make the substantial investment necessary to purchase an existing non-exclusive dealership that had caused the distributor significant reputation problems. That court found that these representatives had not disclosed the existence of a policy against non-exlusive dealerships or the existence or content of an allocation system that might limit the dealer's ability to grow.

The dealer went forward with the purchase and paid the price, but, when the written agreements arrived, they neither embodied the assurances nor made any further disclosures. The district court found that it was not until seven months later, when according to the distributor it was already too late, that the distributor's representatives first claimed that there had always been an allocation system

in effect and that its application foreclosed growth unless the dealer complied with the distributor's demand and made the substantial additional investment required to establish a separate facility. Even then, these representatives were not willing to give any assurances in writing. Even then they did not disclose the existence of the "15% holdback" or the precise mechanism by which the alleged system operated.

When the application of the newly-disclosed allocation system failed to produce compliance with the demand and instead produced this litigation, the distributor refused to renew the dealer's franchise and placed its continued existence and investment in jeopardy. That actual and implicit threat produced the desired result -- a sale at a bargain price to a dealer willing to establish the

required exclusive dealership facility.

On the facts as found by the district court, the present case presents a textbook illustration of the kinds of practices and abuses that Congress sought to eliminate from the automobile industry when it adopted the Act. The consequences of the decision below must be considered against this backgound.

2. Implementation by the Federal Courts. The federal courts have developed a consistent jurisprudence under the Act. The courts of appeals have regularly upheld findings that a manufacturer or distributor breached the statutory duty of good faith when the specific practices identified by Congress as potentially allusive were present. See e.g., Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation In U.S.A., 533 F.2d 510 (10th Cir. 1976) (substantial curtailment of

supply of new cars); Shor-Line Rambler, Inc. v. American Motor Sales Corp., 543 F.2d 601 (7th Cir. 1976)(arbitrary and unreasonable demands involving acquisiton of new facilities). Autowest, Inc. v. Peugeot Inc., 434 F.2d 556 (2d Cir. 1970) (threat to terminate franchise for failure to follow manufacturer price preference). At the same time, the federal courts have recognized that the duty of good faith imposed by the Act is limited and does not proscribe kinds of conduct that might violate state statutory or common law schemes. See e.g., Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir. 1978)(discussing limitations on meaning given "good faith" by the Act).

The courts of appeals had been uniform for thirty years on one point. The presence or absence of coercion, intimi-

dation, or threats of coercion or intimidation is a factual determination to be made based upon the evidence presented to the district court in each case. Prior to this case, the courts of appeals have confined themselves to resolving questions of law and to determining whether sufficient evidence was presented to support a finding that each legally necessary element of the cause of action created by the Act had been proven. Here neither the distributor nor the court of appeals questioned the sufficiency of the evidence presented in this case.

Counsel for petitioner has not found even one decision, prior to the decision below, in which a court of appeals had ruled that determinations made by a district court based upon conflicting testimony were clearly erroneous or, worse still, had proceeded itself to make the

factual determinations necessary to establish that no violation had taken place. That the decision below departs from a jurisprudence that has remained constant for thirty years enhances the need for review by this Court.

3. The Federalism Concerns and The Development of Additional Remedies Under State Law. There are federalism concerns that further enhance the need for review because the decision below tacitly construed the Act as preempting state law concerning the scope of the duty of good faith imposed upon automobile manufacturers by state statutes and decisions. Congress found that prior to 1956, the courts had been reluctant to imply a duty of good faith in otherwise complete written contracts. See, e.g., H.R. Rep. 2850, supra, at 1956 U.S. Cong. Code & Ad. News 4596, 4599-4600 (collecting and

discussing authorities). To remedy that defect in a mercantile relationship of special significance to the economy, Congress adopted a modest definition of the duty of good faith and created a federal cause action for its breach. During the intervening thirty years, however, the states have implemented standards and developed remedies that go well beyond the Act's federal standard and remedy.

The court below adopted the pre-1956 approach that Congress had criticized when it adopted the Act. In so doing, the court eliminated the modest protection from the disparity in bargaining power that Congress sought to guarantee to automobile dealers. But the court did more: It failed to recognize standards of good faith and commercial fair dealing that the state courts have uniformly

implied as part of contracts between merchants. It also failed to implement the special protections the Florida legislature sought to confer upon automobile dealers by adopting its own statutory scheme.

The decision below leaves automobile dealers with fewer protections than other merchants and with fewer protections than they would have today under state law if the Act had never been adopted. In that context, the decision below raises a substantial concern that the court of appeals improperly exercised the federal power to undermine a legitimate exercise of a state's power by the State of Florida.

This Court recently had occasion to address similar concerns in a related context. In New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), the Court had before it a chal-

lenge to a California statute that provided procedural and substantive protections for automobile dealers that went well beyond any protections contemplated by the Act. The Court explicitly noted that the disparity in bargaining power that had prompted Congress to enact the Act to protect retail car dealers from perceived abusive and oppressive acts by manufacturers had also prompted additional legislative responses from some 25 states, including Florida. Id. at 100-01 nn. 4,5.

There the Court rejected a substantial claim that the state's regulatory scheme should be invalidated because it conflicted with the federal antitrust laws. It acknowledged that federalism required recognition that the states also have a power to engage in economic regulation that is entitled to protection. Id. at

110-11.

The decision below undermines at least three aspects of the statutory scheme that Florida adopted in 1976 to provide enhanced protection for its automobile dealers. Florida prohibits manufacturers from threatening to "not renew" a franchise agreement "unfairly or without due regard to the equities of a motor vehicle dealer, or without just provocation. . . ." Fla. Stat. § 320.64 (7)(1985). Florida sought to implement that protection in two ways. It required that the distributor:

> "notify the motor vehicle dealer and forward a copy of such notice to the department [of Highway Safety and Motor Vehicles] of the licensee's [distributor's] intention . . . to fail to renew the franchise agreement . . . at least ninety days before the effective date thereof, together with the specific grounds for . . . failure to renew. . . ."

Id. at § 320.641(1)(a). It gave dealers

the right to recover treble damages for a distributor's breach of those or any other provisions of the statute. Id. at § 320.697. Moreover, it placed the burden of proof on the distributor to prove that the alleged "violation or unfair practice did not occur" once the dealer had made a prima facie case that a violation had occurred. Id.[6]

The problem with the court's approach

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6. Here the distributor failed to renew the franchise agreement when it expired and failed to notify the department of its failure or the grounds therefore. Here the dealer made a prima facie case that the failure to renew was: unfair; did not take due regard to the dealer's equities; and was done without just provocation. The distributor offered no evidence to show that the violations did not occur. The trial judge found that the violations had occurred and awarded damages, albeit refusing to treble them. The court of appeals reversed. It ruled that the distributor had not failed to renew the franchise agreement because it continued to deliver some cars and, in any event, that the dealer had suffered no damages because he had ultimately sold the dealership.

to construing the contract are similar. The court fragmented parts of the contract and construed every provision in the standardized agreement in favor of the party who drafted it and who had the bargaining power to dictate its terms. That approach is reminiscent of the formalistic approach Congress rejected in 1956. See, e.g., H.R. Rep. No. 2850 at 1956 U.S. Cong. Code & Ad. News 4596, 4599-4600. That approach is not consistent with contemporary jurisprudence or with the approach established by the Florida courts. See, e.g., 11 Fla. Jur.2d §§ 101 et seq., esp. §§ 104 (Reasonable construction), 105 (Just Construction), 106 (Construction against party drafting contract). This Court should grant review because the decision below undermines the role and power of the states as well as frustrating the purposes of the Act.

4. Consequences to Manufacturer-Dealer Relationships in the Automobile Industry. At one level, the potential consequences of the decision below are apparent and demonstrate the need for prompt review by this Court. The manifest disparity in the ability of franchised dealers to bargain with automobile manufacturers that concerned Congress in 1956 remains a fact of life in 1986. Automobile manufacturing remains the province of concerns operating from multi-billion dollar asset bases. Automobile dealerships remain largely the province of small concerns with assets typically amounting to less than one thousandth of those of the manufacturers with whom they must deal.

So too, this case makes clear that the practices that concerned Congress remain common today -- the use of short-term agreements that confer few rights but

impose heavy obligations upon the dealer, leaving the dealer's investments largely dependent upon the good faith of the manufacturer. This is a case that has the hallmarks that Congress thought evidence of abuse -- a good dealer suddenly confronted by a demand for a substantial new investment that was backed by tight restrictions on its supply and a refusal to commit to an increase if the investment were made, followed by non-renewal of the franchise agreement leading to a bargain sale of the dealership to a more compliant buyer.

In that context, the decision below stands as a signal that manufacturers may largely insulate themselves from liability so long as they draft their franchise agreements well and do not leave a paper record proving their actual intent. Given the similarity in the practices employed

here to the practices Congress sought to address by the Act, the decision suggests opportunities that manufacturers are likely to seize and test. This Court should grant review to assure that the standard of good faith applied remains consistent with the purposes and intent of Congress.

At another and more specific level, the decision should command this Court's attention precisely because the automobile market has changed in a way that dramatically enhances the significance of the decision below. In 1956, United States automobile manufacturers were net exporters, and imported foreign automobiles accounted for less than two percent (2%) of the cars sold in the domestic market.[7]

7. U.S. Int'l Trade Comm'n, The U.S. Automotive Industry: U.S. Factory Sales, Retail Sales, Imports, Exports, Apparent Consumption, Suggested Retail Prices, and Trade Balances with Selected Countries for

Between 1978 and 1980, the years at issue in this suit, the percentage of new cars sold that were imported jumped from 26.3% to 35.0%.[8] United States imports of new cars from Japan rose even more dramatically during this period, from slightly less than 1.6 million cars (14%) to more than almost 2.0 million cars (22%) of the domestic market, accounting for well over 50% of the total number of cars imported.[9]

The situation has since changed in a way that bears upon this petition. In 1981, Japan imposed its voluntary export restriction.[10] These artificial res-

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Motor Vehicles, 1964-1984 at 2, USITC Publication 1762 (1985)(comparative tables 1947-1984).

8. Id.

9. Id. at 4.

10. U.S. Int'l Trade Comm'n, Operation of the Trade Agreements Program at 280-82, USITC Publication 1535 (June, 1984) (For a summary of history and effects).

traints reduced and fixed the supply of Japanese cars imported into the United States market at less than 1.9 units per year.[11]

Against that background, two key holdings by the court of appeals have great significance. The court found that the general provisions obligating the distributor to sell and the dealer to buy were meaningless. The court construed the special provision governing the "event of shortage or restricted supply" as controlling. Although the panel recognized that there had been no "shortage" in 1978, it ruled that the distributor always had a "restricted supply" within the meaning of the agreement because the distributor's supply was controlled by its foreign parent. The court ruled that the distributor had the right at all times to adopt

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11. Id. at 281.

and employ allocation systems that increased its dealer's dependence upon the distributor's discretion substantially. The court went on to hold American Honda's so-called "Day's Supply System" was a "reasonable" system, even against the background of this case.

The court thus held that a wholly owned distributor of a foreign automobile manufacturer may adopt an allocation system whose components can be manipulated by the distributor to punish or reward particular dealers (or by dealers with inside information)[12] and that reserves a pool in excess of fifteen (15%) of the total supply for the distributor to allocate (or refuse to allocate) totally at its discretion. That holding should be

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12. In the present case, the selection of the allocation date and of the number of preceding days during which warranty cards received would be counted were the critical variables.

considered in light of the stated policy of Congress that the Act was to be construed to supplement not to undermine the antitrust laws.

That holding takes on added significance because it has come at a time when Japan's voluntary export restrictions have already contravened the underlying policies, if not the letter, of the federal antitrust laws.[13] Petitioner submits that the potential for abuse created by the lower court's concept of "restricted supply" and its approval of the kinds of allocation systems illustrated here makes review necessary not only to preserve the Act's dealer-protection policies but also to assure it does not further insulate

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13. Waller, Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond, 14 Law & Pol'y Int'l Bus. 747 (1982); Note Japanese Car Quotas and Antitrust -- A Reexamination, 15 N.Y.U. J. Int'l L. & Pol. 697 (1983).

anticompetitive policies from attack.

B.

The Court should grant review to correct the appellate court's error in substituting its own credibility determinations for those made by the trial judge because that decision will further increase the costs and risks to dealers seeking the protections Congress sought to provide and because it rebuffed its standards of review this Courts so recently affirmed in Anderson v. City of Bessemer City.

1. The Clear Error. The appellate court's application of the standards for review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure and confirmed in Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985), makes a mockery of those standards. It reduces them to matters of form that must be publicly acknowledged and lauded, but whose application in reality is a matter committed to the discretion of the courts of appeals. The decision thus undermines the function of the district courts and

permits the court of appeals to cast their judges in the role of magistrates by another name when the occasion moves.[14]

The court of appeals paid lip-service only to the standards. It mischaracterized the decisional process and criticized a judge on the court with the heaviest criminal docket in the Nation for not

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14. The material findings made by the district court were far more unassailable than the findings under review in Anderson. The district judge heard conflicting testimony and received documents over seven days of trial. At the close of the evidence, the court invited each party to submit proposed findings of fact and conclusions of law. Each responded with detailed findings reviewing the testimony and evidence and the conflicting inferences that might be drawn therefrom. The trial judge who heard the testimony reviewed the proposed findings and conclusion. He made significant changes in the dealer's proposed findings and conclusions before he adopted. The changes reduced the amount of plaintiff's recovery by some nine million dollars, erroneously in petitioner's view and in the view of Florida automobile dealers generally. As modified, the court adopted the dealer's proposed findings and conclusions as its own.

taking time to recast the detailed findings in his own words. The court of appeals examined vague self-serving intern reports prepared by the distributor's agents and detailed written explanations prepared for the distributor after the suit was filed. It examined written transcripts of conflicting testimony given during the trial.[15] Based upon that examination, the court of appeals determined that the district judge committed clear error in resolving disputed facts based upon his assessment of the credi-

15. It inferred from self-serving reports written by the distributor's representatives that the district judge had clearly erred in finding the dealer's representatives testimony more credible than theirs. From documents prepared after the suit was filed in 1979, the court of appeals concluded that the district judge had clearly erred in finding on the basis of conflicting testimony that the claimed allocation system had not existed or been properly explained before 1979 and that it had been improperly used as an instrument of coercion thereafter.

bility of the witness he heard during the seven-day trial in light of the other evidence presented. The litany of error is long; but it is the consequences of that error rather the error itself that creates the pressing need for review.

2. The Consequences of the Error. The general consequences of the decision are two. It must undermine the integrity and finality of the trial function and, more importantly, the confidence of litigants in that function. It will reduce respect for the trial courts and increase the incentives to protract fact-bound litigation to where the stakes are high and because there will always be the possibility of reversal on appeal.

The significance of those consequences will be greater for those subject to the Act. The decision will reinforce the disparity in power created by the dispar-

ity in resouces. The costs dealers must incur in seeking the protection Congress sought to provide will be increased. The value of those protections will be diminished. For manufacturers, the incentive to defend their practices through trial and appeal will be increased with an attendent dimunition in the incentive to observe the duty or settle just claims.

The decision, in short, will further undermine the Act by imposing higher costs and risks on the class Congress sought to protect and by reducing the risks and the incentives for compliance for the class whose abuses Congress sought to limit. These consequences, combined with those described above, will render the Act a shield for manufacturers rather than a sword for dealers.

CONCLUSION

This Court has never considered a case

arising under the Act. The previously settled jurisprudence established by the courts of appeals makes that understandable. The decision below, however, represents a dramatic and troubling departure from that established jurisprudence. The potential for mischief is high, and it will work harm in areas that are of considerable importance to both the automotive and the judicial economy. Accordingly, petitioner submits that review should be granted in this case.

Respectfully submitted,

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85-1441

Supreme Court, U.S.
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CLERK

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CABRIOLET PORSCHE + AUDI, INC.,
Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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FEBRUARY 27, 1986

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CABRIOLET PORSCHE AUDI, INC., a Florida Corporation d/b/a Cabriolet Honda Car,
Plaintiff-Appellee, Cross-Appellant,

v.

AMERICAN HONDA MOTOR CO., INC.,
A California Corporation,
Defendant-Appellant, Cross-Appellee.

No. 84-5698

United States Court of Appeals,
Eleventh Circuit.

Oct. 15, 1985

Appeals from the United States District Court for the Southern District of Florida.

Before JAMES C. HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

JAMES C. HILL, Circuit Judge:

Appellant/defendant American Honda Motor Company, Inc. ("American Honda") appeals the district court's judgment that American Honda breached its contracts with appellee/plaintiff Cabriolet Porsche Audi, Inc. ("Cabriolet") and violated the federal Automobile Dealers' Day In Court Act and various Florida statutes regulating the activities of automobile distributors, importers, and manufacturers engaged in business in Florida. The district court awarded Cabriolet $4,706,645 damages. Both parties appeal the amount of damages.[1]

We reverse, holding that the district court's decisions that American Honda breached its contracts with Carbiolet and

1. American Honda argues the award is speculative and not supported by the evidence. Cabriolet argues that the damages awarded on account of American Honda's violations of the Florida statutues should have been trebled, pursuant to Fla. Statutes, § 320.697.

violated the Florida and federal statutes are based on clearly erroneous findings of fact and/or improperly drawn conclusions of law.[2] Judgment shall be entered in favor of American Honda. Since we dispose of this appeal on these grounds, we do not

2. It is clear that the district court judge adopted virtually verbatim the proposed findings of fact and conclusions of law tendered by appellee/defendant. Indeed, the appellee affirmatively stated in its brief to this court that it would not cite to the record because such references were adequately made in the district court's findings, which, we observe, counsel writing the brief had prepared. We do not approve of the practice of adopting verbatim the findings and legal conclusions submitted by one party to a litigation. Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960, 962 (5th Cir. 1975). While the district court's adoption of the appellee's submissions may partially explain the court's misinterpretation of the evidence and, in some cases, the law, our judgment in this case is not based upon the court's engaging in this disapproved practice. Our judgment is based on our review of the court's findings and legal conclusions against the record and the case and statutory law, which reveals many of the relevant findings to be clearly erroneous and the legal conclusions to be incorrect.

reach the parties' attacks on the amount of damages awarded.

FACTS

The basic disagreement between American Honda and Cabriolet is quite simple to describe. Cabriolet, a Honda dealer which sold Honda cars, parts and accessories to the public from September 1979 to May 1980, and American Honda, the exclusive distributor of Honda products to dealers in the United States, disagree over the number of cars to which Cabriolet was entitled during the Spring of 1979 and onward, when, on account of the OPEC oil embargo and resulting oil crisis, demand for the small, fuel-efficient Honda car was high. Cabriolet claims it was entitled to all the cars it requested, or, at least, more than it received from American Honda. American Honda claims it sent Cabriolet all the cars to which it

was entitled under American Honda's allocation system. When Cabriolet pursued the matter in court, the district court agreed with Cabriolet's position.

While this outlines the basic dispute, it is not enough to "see the forest" in this case. Because we reverse the district court's decision primarily on the ground that many of the court's crucial factual findings are clearly erroneous, it is necessary to "see the trees" as well. We begin our more detailed examination of the relevant facts by identifying in greater detail the parties to this action.

The Parties. American Honda is a wholly owned subsidiary of the Japanese company Honda Motor Company, Limited. It is the exclusive importer and distributor of Honda automobiles throughout the United States, and receives all its cars from its Japanese parent.

Cabriolet is a Florida corporation with its principal place of business in Miami. Mr. Frank Diaz is Cabriolet's president and sole stockholder. At all times relevant to this case, Cabriolet was a dual, or non-exclusive, dealership, selling Porsches, Audis and Ferraris, in addition to Hondas.

The Cabriolet dealership was established in June of 1978 when Cabriolet agreed to purchase the assets of the De Maria Porsche-Audi-Honda-Ferrari dealership in Miami. The agreement included purchase of De Maria's Honda dealership, contingent upon American Honda's approval of Cabriolet as an authorized Honda dealer. Cabriolet filed an application with American Honda seeking such authorization. American Honda approved the application and provided Cabriolet with its standard dealership agreement, which

Cabriolet signed. Although the agreement is dated October 13, 1978, the evidence shows that Cabriolet commenced its Honda operations in mid-September 1978.

Cabriolet retained Mr. Frank Petrucci, who had been the general manager at De Maria, as the general manager at Cabriolet. Cabriolet also hired Mr. Snay, who had been De Maria's sales manager, as its sales manager.

Cabriolet's Operations during the Soft Period. During Cabriolet's first several months as a Honda dealer (fall '78 and winter '79), the market for Honda cars was "soft" (i.e. supply exceeded demand). During this period, Cabriolet was not an effective marketer of Honda cars. For example, between September and November, Cabriolet received 109 cars, but sold only forty-four. This marketing problem was, in large part, on account of Cabriolet's

policy to seek a high gross profit per car. Even though this was a "soft" period, Cabriolet refused to discount the cars below the manufacturer's suggested retail price. Honda representatives suggested that Cabriolet change its pricing policy and sell more cars. Cabriolet refused to do so.

At all times, Cabriolet had an inventory of Honda cars. However, in December of 1978, Cabriolet began to receive fewer cars than it did in its first few months of operation. For example, it did not receive any cars in December 1978 and January 1979.

The Hot Period. By Spring of 1979, demand for the fuel efficient Honda car had increased, primarily on account of the Arab oil embargo. Consequently, Cabriolet's sales record improved, with Cabriolet meeting nearly 100% of American

Honda's sales objectives for the dealership. Indeed, during this "hot" period, Cabriolet, and competing dealers, were preselling all their cars. Cabriolet requested cars from American Honda to meet its presell commitments and general sales expectations. While American Honda sent Cabriolet cars and Cabriolet at all times had an inventory, it did not send Cabriolet all the cars it requested. Thus, Cabriolet had to return deposits it had accepted, cancel contracts it had made, and refuse to accept contracts on a number of vehicles.

Throughout this hot period, Cabriolet complained to American Honda about American Honda's failure to send all the cars it requested. American Honda took the position then (and has done so throughout this litigation) that Cabriolet

was receiving all the cars to which it was entitled under American Honda's allocation system.

The Allocation System. Evidence introduced at trial indicates that American Honda had, at all times relevant to this lawsuit, an allocation system known as the "Day's Supply System." Under this system, dealerships are divided into a number of zones on the basis of geographical location. Each zone is given a certain number of the cars imported from Japan. The cars are then distributed within each zone by comparing all the dealers in the zone as to their rate of sales and their inventory for a given period, typically forty-four days immediately preceding an allocation. Then, through a mathematical formula, cars are allocated to the dealers so that each dealer will have approximately the same

number of day's supply of cars. In its brief, appellant provides the following description of the system, which is fully supported by the record:

The first element of the day's supply system is the dealer's sales rate. American Honda uses a set period of time immediately preceding an allocation to establish a sales rate. The precise period may have changed from time to time, but in general, it has been 44 business days. . . . Thus, if in the 44 business days immediately preceding an allocation a dealer has sold 44 cars, he has a travel rate of one. . . .

American Honda tracks a dealer's sales through his 'warranty cards.' For the dealer to receive credit for a sale of a car, he must send the warranty card for that car to American Honda. . . .

The next element of the day's supply system is a dealer's inventory. American Honda knows what it has shipped to a dealer and by the receipt of the warranty cards knows what the dealer has sold. This allows American Honda to determine the total number of cars available to the dealer for sale. . . . The total availability divided by the travel rate gives to American Honda each dealer's day's supply. . . . To maximize an allocation, it is necessary for a dealer, at the time an allocation is made, to minimize his inventory. . . .

To bring the dealers in a given zone up to the same day's supply, American Honda determines the total number of cars available for allocation and divides it by the travel rate for all the dealers involved. Thus, if there are a thousand cars available for allocation, and the

dealers in the involved area have been selling at a rate of 20 cars per day, the 'warehouse' or 'port' has a 50-day supply of cars. A dealer with a travel rate of one car per day and an inventory of 20 cars, i.e., a 20-day supply, will be entitled to 30 additional cars, i.e., the warehouse day's supply of 50 minus the dealer's day's supply of 20 multiplied by the dealer's travel rate.

As the above explanation of the system indicates, how many cars a dealer gets depends on how many cars it sells and how quickly it sells them. Also the system is a competitive one, pitting dealers in each zone against one another for their shares of the available cars. A dealer selling more cars faster than other dealers will get a higher percentage of cars in the future than will others in the zone. While the mathematical formula and other

details of the system are rather complicated, all a dealer need know to understand the system is that the more cars a dealer sells and the faster it sells them, the more cars that dealer will receive. For all practical purposes, that is the bottom line of the system.

The record indicates that American Honda explained to Cabriolet, when it complained about not receiving all the cars it requested, that the reason it did not get more cars (or all the cars it requested) during the "hot" period was that it had not sold enough cars, fast enough, during the "soft" period when its future allocation rate was being set. For example, Cabriolet's allocation rate for March and April, 1979, the beginning of the hot period, was based on its sales in the preceding forty-four days which included January and February when the mar-

ket was "soft" and Cabriolet was not selling many cars because of its pricing policy.

Fifteen Percent Holdback and Exclusive Facility. American Honda did inform Cabriolet that one way a dealer could obtain more cars was to provide an exclusive Honda sales facility. This offer of extra cars in return for an exclusive facility is another aspect of the Honda allocation system. Under the system, American Honda allocates to its dealers all the cars it expects to receive from a shipment from Japan, except fifteen percent. This fifteen percent "holdback" is used to: (1) replace cars damaged on the trip from Japan; (2) allocate to new dealers, which do not yet have sales rates upon which to base allocations; and (3) provide extra cars to dealers that establish exclusive Honda facilities.

Cabriolet would not establish an exclusive facility unless American Honda would guarantee to give Cabriolet a specific number of extra cars. American Honda would not so commit. No agreement was reached.

Sale of Cabriolet's Honda Dealership. On October 31, 1979, Cabriolet's dealership agreement with American Honda expired by its own terms. Although it was not renewed in writing, Honda continued to send cars to Cabriolet.

In 1980, Mr. Diaz sold Cabriolet's Honda dealership to Mr. Braman. Cabriolet continued to be a Porsche and Audi dealer.

This lawsuit. Cabriolet brought this suit against American Honda, claiming, essentially, that American Honda's failure to give it all the cars it requested amounted to breaches of the dealership agreement, and violations of state and

federal law. The district court agreed, based primarily on its conclusions that American Honda adopted an unreasonable allocation system and embarked upon a path designed to force Cabriolet to establish an exclusive facility of go out of business.

DISCUSSION

Specifically, the district court found that American Honda breached three agreements between itself and Cabriolet: (1) the dealership agreement; (2) the "Minimum Requirements, Planning Volume" document attached to the dealership agreement; and (3) an oral agreement to deliver sixty cars. The court also found that American Honda breached the federal Automobile Dealers' Day in Court Act and various Florida statutes.

The district court's findings of these breaches and violations are based, for the

most part, on two actions allegedly taken by American Honda. First, American Honda's adoption and implementation of its allocation system. Second, American Honda's efforts to encourage Cabriolet to establish an exclusive Honda facility. Thus, initially, we focus on these two actions on the part of American Honda, determining that neither action amounts to or involves any breach of contract or statutory violation. We then turn to consider those findings of breaches and violations based on other conduct, again concluding there were no breaches or statutory violations.

In reviewing the district court's decision on these matters, we are mindful of the scope of review. While we are free to review the trial court's legal conclusions de novo, we are bound by the trial court's factual findings unless they are

"clearly erroneous." The Supreme Court has recently elaborated on the meaning of this standard in Anderson v. City of Bessemer City, N.C., ___U.S. ___, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985):

> Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles ... is that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous

> standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

In regard to findings based on determinations involving the credibility of witnesses, the Anderson court explained,

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge

can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See e.g., United States v. United States Gypsum Co., supra, 333 U.S. at 396, 68 S.Ct. at 542. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 433 (CA2

1945); Orvis v. Higgins, supra [180 F.2d 537] at 539-540 [(CA2 1950)].

Anderson, 105 S.Ct. at 1512-13.

I. AMERICAN HONDA'S ALLOCATION SYSTEM

Initially, it is important to clarify what is and is not at issue in regard to American Honda's allocation system. First, whether American Honda in fact had an allocation system is not at issue. We note that in one of its findings the district court states that American Honda did not have an allocation system at any time relevant to this case. American Honda and Cabriolet spend much time arguing over the correctness of this finding. However, this finding is not at issue, since the district court never relied upon it in finding a breach of contract or a

statutory violation.[3] Indeed, the court based all such conclusions upon its other findings that there was a system, and the adoption, implementation and content of the system were not permitted under the dealership agreement.

Further, there is no real disagreement as to the content of American Honda's allocation system. Both parties agree

3. We note that, in any event, this finding is clearly erroneous. All the evidence indicated that American Honda had an allocation system at the time relevant to this case. Indeed, appellee Cabriolet conceded as much in its amended complaint. In paragraph ten of the amended complaint, Cabriolet states, "at all times pertinent hereto, AMERICAN HONDA operated a system wherein it allocated HONDA motor cars to its dealers throughout the United States." In paragraph eleven, Cabriolet states that American Honda's allocation system "was known as the 'Day's Supply System.'" Cabriolet is bound by admissions in its pleadings. Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983).

that the system is the day's supply system described in the "FACTS" section of this opinion.[4]

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4. Cabriolet essentially conceded as much in its amended complaint, stating,

> 10. At the time that CABRIOLET applied to AMERICAN HONDA for approval as a dealer and at all times pertinent hereto, AMERICAN HONDA operated a system wherein it allocated HONDA motor cars to its dealers throughout the United States.
>
> 11. The allocation system of AMERICAN HONDA during CABRIOLET's tenure as a Honda Dealer was known as the 'Day's Supply System.'
>
> 12. Through this system, AMERICAN HONDA purported to offer each Honda dealer a number of cars per month so that taking into account the cars that a dealer already had available to sell at the time of allocation, upon the allocation, each dealer would have a supply of cars available to it that would 'last' approximately the same number of days. The length of time each dealer's supply would 'last' was determined by each dealer's 'rate of sales,' i.e., the average number of cars sold by that dealer each day during a preceeding [sic] base allocation period.
>
> . . . .
>
> 14. Allocations under AMERICAN HONDA's Day's Supply System were not

Finally, there is no doubt that Cabriolet received every car to which it was entitled under the day's supply system. The trial court never found to the contrary,[5]

4. (Continued)
made by city or district, but, rather, by port zone, among all dealers who were served by a given port of entry. CABRIOLET was served at all times pertinent hereto by the Port of Jacksonville, Florida and allocations were made when cars were 'received' in port.

Counsel for Cabriolet has made bold statements, particularly at oral argument, that might at first glance suggest that Cabriolet does not agree on the matter of the content of the allocation system. However, a close examination of these statements and the specific arguments Cabriolet makes in this appeal reveals that it is claiming that the allocation system was not applied consistently and uniformly, and not that the content of the system was other than that described in this opinion.

5. It is interesting to note that while the district court never found that Cabriolet received even one car less than it was entitled to under the system, it did find that Cabriolet received more cars than it was entitled to. In its factual finding number 25, the court stated,

and Cabriolet has not raised the issue on appeal.[6]

What is at issue here is whether American Honda's allocation system--its content, adoption, or implementation--breached the dealership agreement. The district court found it breached Article VII, section 2, which provides,

> Dealer shall furnish its orders for Honda Automobiles and Honda Automobile Parts to Distributor on forms supplied by Distributor at such time or times and for such period or periods as Distributor reasonably may require from time

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5. (Continued)

> Had American Honda distributed cars during late 1978 pursuant to any purported method testified to by anyone at trial, Cabriolet would have received no more than 44 cars during October and November. No witness was able to explain why Cabriolet received . . . 78 cars during October and November, 1978.

6. We note that, in any event, Cabriolet has not been able to point this court to any evidence in the record that shows that Cabriolet did not receive all the cars to which it was entitled under American Honda's allocation system.

> to time, and all such orders may be accepted by Distributor in whole or as to any part thereof. All orders of Dealer shall be binding upon it unless and until they are rejected in writing by Distributor, provided, however, that in the event of a partial acceptance by Distributor, Dealer shall no longer be bound with respect to the parts of the order not accepted. In the event of shortage or restricted supply, Dealer gives Distributor the right to allocate such supply in any reasonable manner Distributor deems fit in any geographical market area.

(emphasis added). The court found that Honda breached this provision for three reasons: (1) it established an allocation system at a time of no shortage or restricted supply (Breach No. 1); (2) it then applied this unlawfully established allocation system to an actual shortage period and refused to modify or alter the allocation rate, thereby making American Honda's "manner of allocation" as applied to Cabriolet "unreasonable" (Breach No.

2); and (3) the system in general was not a reasonable method of allocation (Breach No. 3).

A. Breach No. 1: Establishment of Allocation Rate at Time of No Shortage or Restricted Supply

The district court's conclusion is based on a factual finding that is clearly erroneous. That finding is that the period between September 1978, when Cabriolet became a Honda dealer, and Spring 1979 was not a period of shortage or restricted supply. While the evidence may well support the finding regarding a shortage,[7] it does not with regard to restricted supply. The record shows that during this period American Honda could obtain only those cars its Japanese owner chose to send. American Honda's supply was

7. We do note, however, that Cabriolet conceded in paragraph 26 of its amended complaint that "[p]rior and subsequent to Fall, 1978, HONDA cars were in short supply. . . ."

not unlimited and must be considered "restricted."

Even if during the period prior to the spring of 1979 there were no shortage or restricted supply, nothing in the dealership agreement prohibits American Honda from adopting and implementing an allocation system in times of surplus or non-restricted supply. That the contract expressly authorizes adoption of an allocation system in times of shortage or restricted supply does not mean one is forbidden at all other times. Indeed, the agreement expressly grants Honda with discretion as to the allocation of cars, stating "Dealer shall furnish its orders for Honda Automobiles . . . to Distributor on forms supplied by Distributor at such time or times and for such period or periods as Distributor reasonably may require

from time to time, and all such orders may be accepted by Distributor in whole or as to any part thereof" (emphasis added).

B. Breach No. 2: Application of System to Shortage Period

The district court found, essentially, that it was unreasonable (and thus a contract breach) to base allocation to Cabriolet during the hot period on the sales and travel rates it established during the period of nonshortage. The court took the position that American Honda should have assisted Cabriolet during the hot period by modifying the allocation system and giving it additional cars.

We disagree. Given the nature of American Honda's allocation system, we find nothing unreasonable in basing Cabriolet's allocation rate for the hot period on the sales rate it established during the soft period. American Honda's

allocation system is a competitive one. Dealers in each zone are competing with each other for the limited number of cars sent from Japan. That an automobile distributor, naturally interested in selling as many cars as possible and encouraging its dealers to do so, should adopt such a competitive system is not unreasonable. Nor is it unreasonable that, under this competitive system, dealers that undertake to sell a maximum number of cars during a soft period are rewarded with more cars during the hot period than are dealers, like Cabriolet, that for their own reasons do not undertake to sell many cars. There may have been something unreasonable about this system had Cabriolet not known or been told that its failure to sell aggressively during the soft period would affect its allocation in the future. However, as

will be made clear in subsequent discussion, the record does not support such a finding here. See infra slip op. pages 245-246, pages ___- ___.

We also note that Cabriolet was not at any time a dealership in trouble. Cabriolet at all times made a profit on its Honda business. Further, Cabriolet at all times had an inventory. Thus, this is not a case where an otherwise reasonable, competitive system has led to the ruination of a dealership, thereby putting into question the reasonableness of the system in application.

C. Breach No. 3: System Unreasonable in General

The district court found that the allocation system, as applied in general, is not a reasonable method of allocation. The court gave five reasons for reaching this conclusion. Each of these reasons is

either irrelevant or based on clearly erroneous factual findings.

The court's first reason is that the allocation system was never disclosed to the dealers including Cabriolet. According to the court, Cabriolet was never advised of the fifteen percent holdback policy or that, if it did not sell cars, subsequent allocations would be diminished.

That Cabriolet may not have been told about the fifteen percent holdback is irrelevant. The relevant information, at least for purposes of this appeal, is information about how a dealer could obtain cars under the allocation system. Knowledge of the fifteen percent holdback policy is not necessary for that. What is necessary is knowledge that a dealer can obtain "extra" cars from American Honda (from the fifteen percent pool) if the

dealer is a new dealer or establishes an exclusive facility. The evidence shows, and Cabriolet concedes (indeed, asserts), that it was told by American Honda that it could obtain additional cars if it provided an exclusive facility. Thus, Cabriolet was knowledgeable of all it needed to know regarding the fifteen percent pool.

The district court's finding that the manner in which the other eighty-five percent of the cars were allocated was never disclosed to the dealers, including Cabriolet, is clearly erroneous. Representatives of every dealership, other that Cabriolet, who testified were aware of the allocation system and knew that under the system the more cars a dealer sells and the faster it sells them, the more cars the dealer receives.

Further, any finding that Cabriolet had not been told about and was not aware of the allocation system and its basic workings is not supported by the evidence. The district court relied on the testimony of three witnesses to reach this conclusion: Mr. Diaz; Mr. Petrucci, and Mr. Snay. Mr. Diaz, the president of Cabriolet, testified that he was not informed of, or otherwise aware of, the allocation system. However, the evidence shows that Mr. Diaz relied quite heavily on Mr. Petrucci, Cabriolet's general manager, to take care of allocation matters. Thus, it was not essential to the operation of Cabriolet that Mr. Diaz knew of the system, as long as Mr. Petrucci knew of it. Mr. Petrucci, who also had been the general manager at the De Maria dealership, and Mr. Kenneth Snay, who was De Maria's sales manager and then joined

Cabriolet as its sales manager, testified that they were never told of the allocation system during the time they worked for the De Maria dealership (pre-September 1978). They never testified that they were not told of the system during the time they worked for Cabriolet. The uncontradicted evidence indicates that they were informed of the system while at Cabriolet. Automobile Dealer Contact Reports, prepared by Mr. Wayne Ferens, American Honda's District Sales Manager for South Florida, indicate that twice in March of 1979 Mr. Ferens "reviewed the allocation system" with representatives from Cabriolet, and Mr. Snay in particular.

Further, documentary evidence indicates that Mr. Snay and Mr. Petrucci were informed of the allocation system long before March 1979; indeed, during the De

Maria dealership. Automobile Dealer Contact Reports, prepared by Mr. Ferens and his predecessor Mr. Finley, indicate that they had explained the basics of the allocation system (i.e., to get cars, a dealer must sell cars) to Mr. Petrucci in particular a number of times in 1977 and 1978.[8]

The testimony of Mr. Petrucci and Mr. Snay indicates they were well acquainted

8. These contact reports show, for example: (1) in March 1978, Mr. Finley "covered the facts of the most recent allocation" with Petrucci and "how [De Maria's] . . . current inventory situation affects them. . ."; (2) in May 1978, Mr. Ferens told Petrucci that his inventory had to be reduced "in order to increase T.R. [i.e. travel rate]"; (3) in June 1978, Mr. Ferens "reviewed allocation system with dealer personnel" and noted that De Maria's sales had been very slow and that it had "received no units from last allocation. Too slow in getting cards in"; (4) in July 1978, Mr. Ferens again reviewed De Maria's sales with Petrucci, noting that "Mr. Petrucci would like more units but travel rate is very low", and that Petrucci "stated that he felt the allocation system was fair and they were not doing the job."

with the workings of the system. While Mr. Petrucci did not know all the details of the system, he indicates in his testimony that he was aware that allotments were based on "how many cars are on a ship, . . . how many warranty cards you [the dealer] have sent into the office in New Jersey, how many cars you might have in inventory . . . ." Petrucci Deposition at 6. He testified, he was aware that it was important to send warranty cards in promptly "because they reflected your sales." Trial Record, vol. 10, at 241. Mr. Snay testified that, while at Cabriolet, Mr. Ferens had reminded him "how important it is to send in the warranty registrations, so when the cars do become available and they [i.e., American Honda] analyze it, the inventory of the dealer body, they [American Honda] would try to replenish the inventory." Id. at 327.

Mr. Snay also testified that he had talked to Mr. Ferens about Cabriolet's pricing policy, which had a negative effect on sales during the soft period, and that Mr. Ferens had suggested Cabriolet "[t]ake a little less profit and blow the cars out of there." Id. at 371.[9] In his deposition, Mr. Snay testified that he understood at the time (and now) that "blowing the cars out" would increase the number of cars Cabriolet would receive, stating "[i]f you blow X amount of units, you have the possibility of altering the amount of cars that would be returned to you or sold to you from American Honda." Snay Deposition at 44-45. See also Trial Record, vol. 10, at 372-73.

9. In his deposition, Mr. Snay indicated that Mr. Ferens may have made this comment in April or May of 1979, though he was not sure. All the other evidence in the record, including contemporaneous documents, indicate that Mr. Ferens made this comment in December 1978 or January 1979.

We find neither the documentary evidence nor the testimony of Petrucci, Snay, and Diaz to support the trial court's finding. To the extent portions of the testimony of Petrucci's, Snay and Diaz may indicate Cabriolet lacked knowledge of or was not told about the allocation system, we find their testimony to be so contradicted by documentary evidence (i.e., the contact reports), so internally inconsistent (i.e., Petrucci's and Snay's own testimony indicating their awareness of the system), and so implausible that a "reasonable factfinder would not credit it." For these reasons, the trial court's finding, resting as it does on any such testimony, is clearly erroneous. Anderson, 105 S.Ct. at 1512-13.

The court's second reason for finding the allocation system unreasonable is that the system was not written down. We find

this lack of a writing to be irrelevant, particularly since the evidence indicates that American Honda's allocation system was orally communicated to Cabriolet and that Cabriolet and other Honda dealers were aware of the system.

The third reason given by the court is that the system is incapable of being fully described in the same manner by any two witnesses. This is a mischaracterization of the evidence. The witnesses' descriptions may have differed as to some details regarding the system, but all testified that the thrust of the system was the more cars a dealer sells and the faster a dealer sells them, the more cars that dealer will receive.

The fourth reason given was that the system could be easily subverted by dealers who received inside information as to allocation and registered unsold cars as

sold. Though neither the district court nor Cabriolet point to any evidence in the record supporting this finding, it appears from our own review that there is some such evidence. However, there is also evidence that American Honda was taking reasonable steps to prevent and detect such subversion. The evidence reveals, for example, that Honda took steps to intensify its auditing of dealerships in certain regions to discover any false reporting of sales.[10] An allocation system

10. In this regard, American Honda sent the following letter, dated November 15, 1979, to Honda dealers in its eastern region:

> On April 16, 1979, you were informed by letter that some dealers were reporting an abnormally high number of demonstrators and sales to questionable leasing companies. We also outlined audit procedures that would be in effect.
>
> We are currently experiencing this same situation again and we would like to point out what action will be taken to correct the problem. Dealer's records will be audited by the District Managers.

is not unreasonable simply because it is possible to subvert it, as long as reasonable steps are taken to prevent and detect such subversion. The evidence indicates that American Honda took such steps.

10. (Continued)

> If a unit has been reported as sold to a leasing company, you will be asked for a copy of the 'bill of sale,' which in turn must be shown as posted in the dealership 'Vehicle Sales Journal.' Those units reported as demonstrators must be in use with mileage shown. Dealer inventory cards should reflect that unit is a demonstrator.
>
> In the event, we find sales and demonstrators reported that are not actually sold or in service, we will add the total numbers of these units to the next allocation which will increase the total availability for the dealership with a resultant decrease in the number of units allocated for the particular dealer involved.
>
> We regret that it is necessary to do this be we will not permit a few dealers to take advantage of the majority of our dealers who report sales on an accurate and timely basis.

Defendant's Exhibit EK, 79-3409.

The fifth reason given was that under the system distribution of the fifteen percent holdback was left to the whim and caprice of lower management personnel. This finding is clearly erroneous. The evidence shows that cars in the fifteen percent holdback pool were used for the following three purposes: (1) to replace cars damaged on the trip from Japan; (2) to establish an inventory for new dealerships, which do not yet have sales rates; and (3) to provide extra cars to dealers that establish exclusive facilities for Honda cars. The evidence shows that American Honda employees had to account for the cars distributed from the fifteen percent pool.

The trial court's sixth reason for finding the system "unreasonable" was that it was not uniformly applied, as certain dealers were favored. The district court

found, for example, that Honda South, one of Cabriolet's competitors, was not treated consistently with the "sell more/get more" allocation system, because "despite selling 100 cars fewer in 1978 than Honda South received from American Honda, that dealership still received almost triple the number of cars in 1979 that it received in 1978."[11] The court also pointed out that Mr. Braman, who purchased Cabriolet's Honda dealership, sold only 345 cars out of the 424 received in 1980, yet received 897 cars in 1981 and 1385 cars in 1982. Further, the court found that, had Honda distributed cars during later 1978 pursuant to its purported system, Cabriolet would have received no

11. In 1978, Honda South received 281 cars from American Honda and sold 188 of them during the year. In 1979, it received 690 cars from American Honda.

more than forty-four cars in October and November 1978, rather than the seventy-eight it received.

The record does not support the district court's finding that Honda's system was not uniformly applied. The record clearly indicates that, under American Honda's allocation system, one cannot determine from simply the number of cars a dealer sells in a given year, how many cars that dealer is entitled to receive the next year. Allocations are made on the basis of forty-four days periods, not years. Further, to determine the number of cars to be allocated, other factors have to be examined in addition to number of cars sold. These other factors include: (1) how many cars other dealers in the zone had sold during the relevant period and how quickly they had sold them; (2) how many cars were sent from Japan

during the relevant period; (3) whether the dealer provided an exclusive Honda facility; (4) whether the dealership was a new one. The trial judge did not remark on any of these factors. He looked only at the number of cars sold during a given year and the number received. Such evidence and reasoning are insufficient to sustain the trial court's finding that American Honda's allocation system was not uniformly applied.

Further, we do not find, and Cabriolet does not point to, any evidence in the record that would support the trial court's finding. Indeed, the evidence we do find in the record indicates that the cars were allocated in accordance with the allocation system. At trial, Mr. Esserman, owner of Honda South, explained that the reason he received so many cars in 1979 was that he sold substantially more

cars in 1979 than in 1978. He explained that he had just opened the dealership in 1978 and did not yet know the product very well. In 1979, his knowledge of the product increased and, consequently, his sales record improved. The record indicates that Mr. Braman had agreed to establish an exclusive facility. Under American Honda's allocation system, this entitled him to extra cars. In regard to Cabriolet, the evidence shows that it was a new, recently opened dealership in October and November 1978, and thus under the allocation system entitled to be provided cars without strick reference to any prior sales rate. Also, Cabriolet would have been entitled to receive credit for some of the sales made by the De Maria dealership. For, though Cabriolet did not sign the Honda dealership agreement until

October 13, 1978, it did start operating the De Maria dealership in September.

Finally, the court found that the allocation system was unreasonable because American Honda used the cars in fifteen percent holdback pool as "weapon[s] to coerce or attempt to coerce certain dealers like Cabriolet into making extra-contractual concessions." As is shown under heading "II" of this opinion, Honda never coerced Cabriolet to make any extra-contractual concessions. At the very most, the record shows that American Honda responded to Cabriolet's requests for more cars by suggesting that Cabriolet could obtain extra cars if it established an exclusive facility.

Nor does the record indicate that American Honda used the cars in the fifteen percent holdback pool to coerce any other Honda dealer. To support its

finding, the district court appears to rely primarily on evidence regarding the Friendly dealership, which was originally a Saab and Honda dealership and terminated the Saab dealership in 1980. Relying on the testimony of Friendly's vice president and general manager, Mr. Bower, the court states, "American Honda orally represented that additional cars would be given to Friendly if it got rid of Saab . . . and threatened Friendly that 'if it didn't get bigger it would get smaller.' Shortly thereafter, Saab was no longer located at the Friendly facility. . . ." This is a mischaracterization of the record. Mr. Bower testified that he was not forced to become an exclusive dealer, but chose to do so in 1980 because the Saab dealership was not profitable. The alleged threat about "getting smaller" was not made in connection with Friendly's terminating the

Saab dealership. The record indicates the statement was made in 1983, about three years after Friendly terminated the Saab dealership.

Having determined that the district court's characterizations of the allocation system as inconsistent, secretive, and coercive are clearly erroneous, we are left with a system under which allocations are based essentially on a dealer's sales record and under which a certain number of cars are reserved to replace damaged cars, to help supply new dealerships, and to encourage dealers to establish exclusive facilities for Honda cars. It may well be that left to our own devices we or the district court would have adopted a different system or modified this one. However, that is irrelevant. The sole question before us is whether the system American Honda

adopted is unreasonable. We find nothing "unreasonable" about this system. See, e.g., Cecil Corley Motor Co. v. General Motors Corp., 380 F.Supp. 819, 840 (M.D. Tenn. 1974).

II. EXCLUSIVE FACILITY

The district court found that American Honda decided internally that it did not want dual dealers in South Florida and embarked on a course of conduct designed to force dealers to become exclusive or sell out. In regard to Cabriolet, that conduct, according to the district court, consisted of imposing the following sanctions upon Cabriolet for refusing to establish an exclusive facility: (1) refusing to renew the dealership agreement; (2) refusing to lower Cabriolet's capitalization requirements; and (3) refusing to give Cabriolet extra cars from the fifteen

percent pool.[12] Based on these findings, the court found violations of state and federal statutes and breaches of the dealership agreement. The findings with regard to renewal of the dealership agreement and Cabriolet's capitalization requirements are clearly erroneous. We find nothing in the record, nor does Cabriolet direct us to any evidence, that indicates that any such actions were threatened or performed on account of Cabriolet's failure to build an exclusive facility.

The finding with regard to the extra cars is supported in part. The record indicates and all parties concede that

12. We observe that the trial court's findings could perhaps be interpreted as conditioning receipt of any cars at all on the building of the exclusive facility. Such a finding is not supported by the record and would be clearly erroneous. The record shows that building an exclusive facility was a condition only of receiving extra cars.

American Honda told Cabriolet that it could obtain additional cars if it established a facility exclusively for Honda cars. The offer was not made in any threatening or demanding manner. The district court viewed the offer as part of a scheme to force Cabriolet to become exclusive and determined the offer violated four contractual and statutory "good faith requirements": (1) the "good faith" requirement in Article III, section three of the dealership agreements; (2) the implied condition of cooperation in the dealership agreement; (3) the federal Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221, et seq.; and (4) Florida Statutes, section 320.64(6). It is the district court's conclusions that the offer was not made in good faith and was violative of the contract and statutory

provisions that are not supported by the record or case law.

A. Dealership Agreement

Article III, section 3 provides,

> If during the term of this Agreement, expansion of Dealer's premises is necessary to properly sell and service customers, it is agreed that Dealer and Distributor will enter into a bona fide and good faith negotiation to determine the extent of improvements necessary to fulfill the requirements of such expansion of business. Upon agreement by Distributor and Dealer of any change of said description and/or plans, a new 'Description and Plans of Dealer's Premises' shall be prepared, signed by Dealer, and approved by Distributor in writing.

Cabriolet argues that Honda negotiated in "bad faith" because Honda refused to execute a written agreement that would guarantee a specific number of additional cars if expansion took place. We do not find this to constitute a lack of good faith. The evidence showed that American Honda had no control over the number of

cars sent by its Japanese parent and thus could not guarantee in advance how many cars it would have at any given time. Under such circumstances, it is not bad faith to refuse to guarantee, in writing or otherwise, that a certain number of cars would be provided. Indeed, under these circumstances, it would be bad faith to make such a guarantee, knowing it may well not be performed. Honda's conduct here did not constitute a breach of this good faith provision in the dealership agreement.

The court also found that American Honda breached an implied condition of cooperation in the dealership agreement "when, for its own extra-contractual purposes it failed to provide vehicles [to Cabriolet] . . . when procedures were available to grant relief even under the terms of its purported system of alloca-

tion." Here, the court is apparently referring to American Honda's refusal to give Cabriolet extra cars from the fifteen percent pool unless Cabriolet established an exclusive facility.

Even assuming such an implied condition exists, we find no breach. Cabriolet received every car it was entitled to receive under the allocation system. As becomes clear in our upcoming discussion of the federal and state statutory violations, we find nothing unreasonable, unfair or coercive about American Honda's policy of using the cars in the fifteen percent pool to encourage dealers to establish exclusive facilities. It must be remembered that Cabriolet was not a dealer in trouble. At all times, it had an inventory and made a profit.

B. The Federal Automobile Dealers' Day in Court Act and Florida Statutes, Section 320.64(6)

In essence, both the Federal Act and the Florida statute prohibit automobile manufacturers/distributors from coercing or otherwise intimidating automobile dealers in regard to their business relationship. The federal Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221, et seq., "gives to an automobile dealer a federal cause of action against an automobile manufacturer who fails to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise." Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 514 (10th Cir. 1976). See also Joe Westbrook, Inc. v. Chrysler Corp., 419 F.Supp. 824, 831 (N.D.Ga. 1976). The Act

defines "good faith" as

> the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemend to constitute a lack of good faith.

15 U.S.C. § 1221(e). Case law is clear that a manufacturer fails to act in good faith for purposes of recovering under this Act only if its conduct amounts to coercion or intimidation. In absence of coercion, intimidation or threats thereof, there can be no recovery under the Act, even if the manufacturer otherwise acts in "bad faith" as that term is normally used. E.g., Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1038 (5th Cir.), cert. denied, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981); Minson

Plymouth, Inc. v. Chrysler Motors Corp., 554 F.2d 1266, 1267 (4th Cir.1977); Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 682, 685 (6th Cir. 1976); Globe Motors, Inc., v. Studebaker-Packard Corp., 328 F.2d 645, 646 (3d Cir. 1964).

Florida Statutes, section 320.64(6) also requires "coercion." That statute, in essence, prohibits motor vehicle manufacturers, distributors and importers from coercing or attempting to coerce motor vehicle dealers to enter into any agreements with them. Under section 320.697 of the Florida Statutes, any person that suffers a pecuniary loss on account of such coercion has a cause of action against the wrongdoer for damages.

The district court found that American Honda's offer of extra cars (from the 15% pool) in return for establishing an exclusive Honda facility amounted to

coercion in violation of the federal and state statutes. We disagree, holding that, as a matter of law, American Honda's conduct did not constitute "coercion."

We have little doubt that had Honda threatened to deny Cabriolet all cars, or any cars to which it was entitled, unless Cabriolet provided an exclusive facility, this would be evidence of coercion. See, e.g., Rea v. Ford Motor Co., 497 F.2d 577, 585 (3d Cir.), cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974); David McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), cert. denied, 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975); Randy's Studebaker Sales, Inc., 533 F.2d at 516; Junikki Imports, Inc. v. Toyota Motor Co., 335 F.Supp. 593, 595 (N.D.Ill.1971). This is not the case here.[13] American Honda did not

13. See supra note 12.

threaten to take away, and did not take away, cars to which Cabriolet was entitled under the allocation system.[14] Nor did American Honda treat Cabriolet inequitably or unfairly when Cabriolet refused the offer. Cabriolet continued to receive cars from American Honda and maintain an inventory until it sold its dealership to Mr. Braman. Cabriolet did not receive extra cars, but it received no less than it was entitled to receive under the allocation plan.

All American Honda did was suggest to Cabriolet a way to obtain extra cars--that

14. The only evidence of any threats of this nature was the testimony of Mr. Bower, vice president and general manager of the Friendly Dealership, that his dealership was threatened by American Honda that "if it didn't get bigger, it would get smaller." However, this "threat" was delivered in March 1983, three years after Friendly decided to focus on Honda and terminate the Saab dealership.

is, more cars than Cabriolet was entitled to receive. This does not amount to coercion. American Honda's suggestion did not present a "condition [] [i.e., the exclusive facility] which benefit[ed] only, or primarily, the manufacturer," as is typically the case in cases of "coercion." Volkswagen Interamericana v. Rohlsen, 360 F.2d 437, 442 (1st Cir.), cert. denied, 385 U.S. 919, 87 S.Ct. 230, 17 L.Ed.2d 143 (1966). Both sides would be expected to profit if Cabriolet had gone exclusive. American Honda would have better representation in the market place and Cabriolet would have the opportunity to increase its sales and profits. We find nothing coercive in presenting to a car dealer an opportunity to reap substantial profits from an exclusive dealership in exchange for the expenditures necessary to establish the exclusive dealership. All

American Honda did was provide Cabriolet an extremely lucrative option--a carrot on a stick. American Honda's conduct amounted to nothing more than "recommendation, endorsement, exposition, persuasion, urging," which, under the federal act, "shall not be deemed to constitute a lack of good faith."

III. MISCELLANEOUS BREACHES AND VIOLATIONS

A. Other Breaches of the Dealership Agreement

The district court found breaches of two other provisions of the dealership agreement. One provision is Article II, section 1, which provides

> Subject to the provisions of this Agreement, Distributor shall sell and deliver Honda Automobiles and Honda Automobile Parts to Dealer for resale and assist the Dealer and its operation relating to the resale of and customers' service for Honda Automobiles and Honda Automobile Parts.

The district court found that by refusing to deliver available Hondas to Cabriolet (presumably from the fifteen percent holdback), American Honda failed to assist Cabriolet in its operations relating to the resale of cars.

It is undisputed that during December 1978 and January 1979, American Honda did not provide any cars to Cabriolet and that it did not provide Cabriolet all the cars it requested during the hot period, even though there were some cars in the fifteen percent holdback pool. Thus, there is no doubt, and Honda concedes, that the district court correctly found that Honda refused to deliver available cars to Cabriolet. However, this refusal to deliver did not amount to a breach of American Honda's contractual duty "to assist" Cabriolet in its sale of Honda cars. Article II, section one expressly

provides that "subject to provisions of this agreement, Distributor shall . . . assist dealer . . ." (emphasis added). As explained above, provisions of the agreement permitted American Honda to establish a reasonable allocation system. American Honda established such a system. Cabriolet received all the cars to which it was entitled under that system. Cabriolet simply was not entitled to any cars during December and January and was not entitled to all the cars it requested during the hot period. Thus, American Honda "assisted" Cabriolet to the extent to which it was required under the dealership agreement.

The district court also found that American Honda breached Article III, section 7, which provides,

> Dealer and Distributor fully understand that a successful operation of Dealer's business will to a great extent depend on the amount of net working capital,

owner's equity and line of credit with which Dealer maintains its business operations, and, therefore, Dealer agrees that it will at all times maintain as its minimum net working capital, owner's equity and lines of credit in accordance with the amount set forth in a separate minimum net working capital agreement to be executed by Dealer and Distributor at the time of the execution of this Agreement. If due to changed conditions, Distributor shall deem it necessary to materially increase or decrease the amount of minimum net working capital, owner's equity or line or lines of credit for Dealer to properly operate its business, Dealer agrees to maintain the revised amount of minimum net working capital, owner's equity, or line or lines of credit, as the case may be deemed necessary by Distributor, to meet such changed conditions for the proper operation of Dealer's business and Dealer and Distributor agree to execute a new Sales Agreement, thereof setting forth such revised amounts. If the amounts thereof are increased or decreased, Dealer will meet the new minimum net working requirements within the time agreed upon by Dealer and Distributor.

The district court found that American Honda breached this provision by requiring Cabriolet to maintain excessive net working capital in its operation and refusing to decrease the net minimum capital requirements, even though Cabriolet received a decrease in the delivery of the number of cars upon which the minimum capital requirements were based. According to the court, those requirements were based on Cabriolet receiving 264 cars and when Cabriolet received less than that, American Honda was obligated under the dealership agreement to reduce the net working capital requirements.

We disagree. Nothing in section seven of Article III requires American Honda to reduce or in any way change the net working capital requirements. The provision expressly grants total discretion regarding changes to American Honda, stat-

ing, "[i]f due to changed conditions, Distributor shall deem it necessary to . . . increase or decrease the amount of minimum net working capital . . ." (emphasis added).

Further, the district court did not award any damages for this alleged breach, and Cabriolet does not challenge this. Thus, even if there were a breach, no damages award could now be based upon it.

B. Breach of "Minimum Planning Volume" Document

The district court found that American Honda also breached a written contract between itself and Cabriolet contained in the separate "Minimum Planning Volume" document attached to the dealership agreement. That document indicates that Cabriolet's minimum planning volume is 264 cars per year. The court determined that this document obligated Honda to provide

Cabriolet at least 264 cars per year and that American Honda breached this contract by not delivering that number of cars.

This finding is clearly erroneous. In support of the finding, the trial court cites only to the document. Nothing in the document indicates Honda agreed to provide 264 cars to Cabriolet. Further, virtually all the extrinsic evidence shows that the "planning volume" is not the minimum number of cars a dealer is to receive in a year, but rather is only a reflection of sales market expectation in a particular area for a particular dealer, and used for planning purposes only.

The only evidence Cabriolet points to in support of the trial court's finding is the following testimony of Mr. Diaz:

> Q. Prior to the time that you signed the four pages of Exhibit 7, did you discuss planning volume with any representative of Honda?
>
> . . . .

THE WITNESS: During the time I met with the Honda representatives, specifically Mr. Ferens and Mr. Madden both, at the offices of mine in Miami, my offices, not theirs, I was negotiating, if you will, with them for the franchise.

At that time they informed me very precisely of the terms and conditions that were required as to capitalization.

Since the franchise was, in fact, a much more expensive franchise than $79,000 in capital, the floor plan was well in excess of $150,000.

None of those were serious concerns of mine. I certainly qualified on them.

BY MR. ROSENBERG:

Q. As pertaining to the planning volume, you were told they were receiving no less than these amounts of vehicles per year, no less than how many vehicles, the amount on the--

A. Yes, 264 vehicles, and they were not only to sell these but, obviously, in theory we had to sell more if we were to increase it and American Honda would review our franchise.

Trial Record, vol. 9, at 61-62.

The vagueness of that testimony does not contradict, with clarity sufficient to support the trial court's finding, the earlier explicit testimony of this same witness, Mr. Diaz:

> Q. Did you discuss with anyone at American Honda this planning volume--264, what this meant?
>
> A. No, I did not.

Id. at 58. Given this contradiction in Mr. Diaz's testimony and all the evidence indicating that "minimum planning volume" is not the number of cars a dealer is to receive in a year, the district court's finding that American Honda breached the requirements of the document at issue here is clearly erroneous. See Anderson, 105 S.Ct. at 1512-13 ("Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder

would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination").

C. Breach of Oral Contract for Sixty Cars

The district court found that American Honda breached an oral contract to supply Cabriolet with at least sixty additional cars during the "hot" period. The court also found that the breach of this oral agreement constituted "bad faith," in violation of the federal Automobile Dealers' Day in Court Act. While we doubt the validity of this oral modification to the dealership agreement[15] and that

15. The dealership agreement provides that only certain specifically identified Honda officials may modify it and that any such modification must be in writing. The American Honda employee who allegedly promised Cabriolet the sixty cars was not one of the Honda officials authorized to modify the dealership agreement and the alleged promise to deliver sixty cars was not in writing. The alleged oral contract

such a "breach" would constitute "bad faith" under the federal act,[16] we need not address this matter, since the district court did not award damages for this breach and Cabriolet does not attack its failure to do so on appeal. Indeed, at oral argument, counsel for Cabriolet characterized this matter as "somewhat of a moot point." We will not review that which is not at issue.

D. Other Violations of Florida Statutes

The district court found that American Honda violated sections 320.64(4) and (8) and section 320.641 of the Florida

15. (Continued)
for sixty cars was a modification of the dealership agreement. That agreement permitted Honda to adopt and implement a reasonable allocation system. Honda had done so, and communicated that system to Cabriolet. Under that system, Cabriolet would not receive an extra, unearned sixty cars, unless it provided an exclusive facility or was a new dealership.

16. See discussion slip op. page 250, pages ___ - ___ of text.

Statutes. Under section 320.697, an automobile dealer suffering pecuniary loss on account of a violation of these provisions by a motor vehicle manufacturer, distributor, and/or importer has a cause of action against that party for damages.

Subsection 320.64(4) essentially forbids motor vehicle distributors, manufacturers, and importers from engaging in any illegal act relating to their business. The district court found that American Honda violated this provision because its breaches of the dealership agreement and violation of the federal Automobile Dealers' Day in Court Act amounted to engaging in "an illegal act relating to . . . [its] business."

Because we have held that American Honda did not breach its dealership agreement or violate the federal act, the district court's decision here cannot be

sustained. We also note, though we need not decide, that contract breaches and violations of the federal act apparently do not constitute an "illegal act" for purposes of the Florida statute. See Gates v. Chrysler Corp., 397 So.2d 1187, 1190 (Fla. Dist. Ct. App. 1981) (for purposes of the statute, an "illegal act" is an act subject to criminal penalties).

Subsection 320.64(8) is violated if a motor vehicle manufacturer, distributor or importer

> has unfairly or without due regard to the equities of a motor vehicle dealer, or without just provocation, canceled or failed to renew, the franchise agreement of such motor vehicle dealer.

Section 320.64(1)(a) provides that motor vehicle manufacturers, distributors and importers

> shall notify the motor vehicle dealer and forward a copy of such notice to the department of . . . [their] intention to discontinue, cancel, or fail to renew the franchise agreement of any of its motor vehicle dealers

> at least 90 days before the effective date thereof, together with the specific grounds for discontinuation, cancellation, or failure to renew of said agreement, if discontinued, canceled, or not renewed.

The district court found both sections were violated when Honda refused to renew Cabriolet's dealership agreement when it expired by its own terms on October 31, 1979. According to the court, American Honda refused to renew the agreement because Cabriolet would not erect exclusive facilities and Cabriolet had filed this lawsuit.[17]

17. The court further found that 320.641 (1)(a) was also violated when American Honda discriminated against Cabriolet in allocation and distribution of vehicles, thereby constituting a de facto "termination" or "discontinuance" of Cabriolet's dealership, in violation of the notice requirements of Section 320.641. The record does not support a finding that Cabriolet was discriminated against in allocation. Cabriolet points to no evidence, and we do not find any evidence, indicating that Cabriolet did not receive every car to which it was entitled under American Honda's allocation system.

We find neither 320.64(8) nor 320.641(1)(a) applicable. Both provisions contemplate an actual termination of the business relationship between the dealer and distributer. The uncontroverted evidence shows that American Honda continued sending cars to and engaging in business with Cabriolet up until May 1980 when Mr. Diaz sold the Honda dealership to Mr. Braman. Even after the dealership agreement supposedly expired in October 1979, Honda continued to allocate cars to Cabriolet.[18] Even the district court found that

17. (Continued)
The court also found that American Honda violated section 320.64(7), which forbids manufacturers from "unfairly or without due regard to the equities of a dealer, or without just provocation, threaten[ing] to cancel or not renew a franchise agreement. . . ." There is no evidence in the record to support this finding.

18. Between November 1979 and April 1980, Cabriolet received ninety-nine cars from Honda.

American Honda at no time took any steps toward formal termination of the dealership. If anything, American Honda's conduct implied a renewal of the dealership agreement. The only step American Honda failed to take was to renew the agreement formally in writing. We will not put form above substance in this instance. American Honda's conduct did not amount to a "failure" to renew within the meaning of the Florida Statute. Thus, 320.641(1)(a) and 320.64(8) do not apply.

We further note that, even if these sections did apply, no pecuniary injury was suffered on account of the absence of a formal agreement. Cabriolet continued to operate as a Honda dealer and receive cars until May 1980. Cabriolet suggests it was injured in that it felt like a "second class citizen." However, the Florida

statute permits damages to be awarded for pecuniary injuries only.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court, which concluded that American Honda breached contracts with Cabriolet and violated the federal Automobile Dealers' Day in Court Act and various Florida statutes. Judgment shall be entered in favor of appellant American Honda.

REVERSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-3409-CIV-ALH

CABRIOLET PORSCHE AUDI, INC.
A Florida corporation,
d/b/a Cabriolet Honda Car,
Plaintiff,

vs. AMENDED FINAL JUDGMENT

AMERICAN HONDA MOTOR CO.,
INC., a California corporation,
Defendant.

CABRIOLET PORSCHE AUDI, INC., d/b/a CABRIOLET HONDA CAR, the plaintiff in this action, is a Florida corporation and, was at all times pertinent to this action, a non-exclusive Honda dealer. CABRIOLET has sued AMERICAN HONDA MOTOR CO., INC., which is a wholly owned subsidiary of Honda Motor Company, Ltd., the Japanese manufacturer and a California corporation. This dispute centers around the Dealer Agreement which was made a part of this record.

The case was tried to the Court without a jury. The Court finds as follows:

FINDINGS OF FACT

1. Cabriolet is a corporation organized and existing under the laws of the State of Florida. From September, 1978 to March, 1980 Cabriolet's principal place of business was at 3780 Bird Road, Miami, Florida (Ex. P-7).

2. American Honda Motor Co., Inc. (American Honda) is a wholly owned subsidiary of Honda Motor Company, Ltd., the Japanese manufacturer, and is a corporation organized and existing under the laws of the State of Claifornia, having its principal place of business in Gardena, California, and a regional office in Norcross, Georgia. American Honda automobiles under Chapter 320.61(1) Florida Statutes. (Ex. p.7, p.24; Diaz,

Tr. 64; Ferens, Tr. 540; Madden, Tr. 762; Defendant's Answer to Amended Complaint.)

3. As a wholly owned subsidiary, American Honda, is the exclusive importer and distributor of Honda automobiles throughout the United States, which it received from its parent corporation, the Japanese manufacturer of Honda. The Japanese manufacturer of Honda controls American Honda and makes and has the right to make all of the decisions regarding marketing of vehicles. (Answer to Amended Complaint, Affirmative Defense Seven, Diaz, Tr. 64, Ex. P-7, Ex. P-24) American Honda has no independent distributors in the United States. (Schmillen Dep. 10/28/82 p. 14; Madden, Tr. 762).

4. Frank L. Diaz, the owner of Cabriolet, first became involved in the automobile business in the summer of 1976 when he acquired Reinhart Volkswagen in

Miami (Diaz, Tr.45). In 1977, Mr. Diaz acquired a Volvo dealerhip from De Maria's Orange Motors. (Diaz, Tr. 46). Mr. Diaz was the factory-approved dealer principal in day-to-day control of the Volkswagen-Volvo dealerships. (Diaz, Tr. 47; Petrucci, Tr. 149).

5. The De Maria Honda Car operations, as authorized and required by American Honda, had been operated for many years at a motorcycle location on Bird Road. In May, 1976, American Honda demanded that it be moved to the building at 3780 Bird Road at which De Maria also operated his Porsche, Audi, and Ferrari franchises. This demand was acceded to by the De Maria Organization (Petrucci, Tr. 147-151).

6. The De Maria-run operation of the Honda Car dealership, received numerous

complaints, especially with respect to its customer service. (Diaz, Tr. 51-52). Indeed, during a 1977 independently commissioned Dealer Image Survey conducted for American Honda, De Maria's rating was -16.11, when the mean score for all United States dealers was +431.43. (Ex. P-10; Ferens Tr. 745). American Honda was not satisfied with the Miami representation given to its products by De Maria (Ex. P-26).

7. Frank Petrucci was General Sales Manager of the De Maria's dealerships beginning in 1975. (Petrucci, Tr. 147). Under Mr. Petrucci, De Maria had never had any difficulty in receiving Honda cars for resale (Petrucci, Tr. 159).

8. During June, 1978, after negotiations, Mr. Diaz agreed to purchase the De Maria Porsche, Audi, Honda and Ferrari dealership being operated at 3780 Bird

Road, in Miami, Florida. (Diaz, Tr. 47-48).

9. The total purchase price paid by Cabriolet for the De Maria Porsche, Audi, Honda, and Ferrari dealership was $1.6 million. Of this amount, approximately $100,000 was for physical assets related to Honda, and $400,000 was for the good will (transfer of the franchise) associated with Honda. No cars were included in the $100,000 purchase price for Honda-related physical assets (Diaz, Tr. 65).

10. By the Summer of 1978, American Honda decided internally that it did not want to have dual dealers in South Florida, and American Honda set out upon a course of conduct designed to coerce dealers into removing their Honda operations from their other franchise lines. (Ferens, Tr. 624). Unknown to its dealers, the company set upon a policy by

July, 1978 to obtain exclusive Honda dealerships in the Miami area (Ferens Tr. 626; Madden, Tr. 779).

11. Mr. Diaz and Cabriolet filed an Application for a Honda Dealership, together with all other required documents, during the Summer, 1978. (Ex CF, Ex P-13).

12. At the time of the filing of Cabriolet's application, and at the time of the subsequent execution of its Honda Dealer Agreement, Wayne Ferens was American Honda's District Sales Manager in South Florida; Robert Madden was the Zone Manager, based in Norcross, Georgia (Ferens, Tr. 575; Madden, Tr. 762); Jack Billmyer was the Eastern Regional Sales Manager and Clifford Schmillen was Vice President, for Automobile Sales (Ferens, Tr. 576; Ex. P-7).

13. Cabriolet signed a Honda Dealer Agreement ("Dealer Agreement") dated October 13, 1978, which by its terms expired on October 31, 1979. (Ex. P-7, P-24; Diaz, Tr. 55). This Dealer Agreement required that the Cabriolet Honda operations continue to be conducted only from the premises at 3780 Bird Road, Miami, Florida, the same facility as had housed the De Maria operations. At the time that the Dealer Agreement was signed, Porsche, Audi, Honda and Ferrari were all being sold from those premises (Diaz, Tr. 56) with the approval and consent of American Honda (Ex. P-7).

14. The Dealer Agreement, was prepared by American Honda, was preprinted, and was the only standard form agreement used by American Honda for all of its dealers. It provided, in pertinent part, as follows:

"Subject to the provisions of this Agreement, Distributor shall sell and deliver Honda Automobiles and Honda Automobile Parts to Dealer for resale and assist the Dealer in its operation relating to the resale of and customers' service for Honda Automobiles and Honda Automobile Parts." (Article II, Section 1, Page 1)

* * *

"In the event of shortage or restricted supply, Dealer gives Distributor the right to allocate such supply in any reasonable manner Distributor deems fit in any geographical market area." (Article VII, Section 2, Page 10)

"To provide proper Honda Automobile and Honda Automobile Parts representation commensurate with the reputation and goodwill attached to the name "Honda" and to facilitate the proper sales and servicing of Honda Automobiles and Honda Automobile Parts, Dealer will maintain business premises satisfactory to Distributor with respect to appearance, location, size of buildings, space allotment and adequate layout as well as equipment, showroom, office, storage space, used car lot, body repair and paint shop, if any, parking facilities, workshop and service operation; each of which shall comply with the

standards, policies, and directives of Distributor as developed in proportion to the number of Honda Automobiles and Honda Automobiles Parts that may reasonably be expected to be sold and serviced by Dealer." (Article III, Section 1, Page 3)

* * *

"Once a dealer has established its business facilities at a location mutually satisfactory to Dealer and Distributor, Dealer will not move to or establish a new or different location, branch sales office, branch service establishment, or any place or business including any used automobiles or truck lots or location without first obtaining a written approval of the distributor." (Article III, Section 4, Page 4)

* * *

"If during the term of this Agreement, expansion of Dealer's premises is necessary to properly sell and service customers, it is agreed that Dealer and Distributor will enter into a bona fide and good faith negotiation to determine the extent of improvements necessary to fulfill the requirements of such expansion of business. Upon agreement by Distributor and Dealer of any change of said description and/or plans, a new "Description and Plans of Deal-

er's Premises" shall be prepared, signed by Dealer, and approved by Distributor in writing." (Article III, Section 3, Page 3)

* * *

"Dealer and Distributor fully understand that a successful operation of Dealer's business will to a great extent depend on the amount of net working capital, owner's equity and line of credit with which Dealer maintains its business operations, and, therefore, Dealer agrees that it will at all times maintain as its minimum net working capital, owner's equity and lines of credit in accordance with the amount set forth in a separate minimum net working capital agreement to be executed by Dealer and Distributor at the time of the execution of this Agreement. If due to changed conditions, Distributor shall deem it necessary to materially increase or decrease the amount of minimum net working capital, owner's equity or lines of credit for Dealer to properly operate its business, Dealer agrees to maintain the revised amount of minimum net working capital, owner's equity, or lines of credit, as the case may be deemed necessary by Distributor, to meet such changed conditions for the proper operation of Dealer's business and Dealer and Distributor agree to execute

> a new Sales Agreement, thereof [sic] setting forth such revised amounts. If the amounts thereof are increased or decreased, Dealer will meet the new minimum net working requirements within the time agreed upon by Dealer and Distributor." (ArticleIII, Section 7, Page 4)
>
> (Ex. P-24 [Emphasis supplied]).

15. Attached to the Dealer Agreement was an important document entitled "Minimum Requirements, PLANNING VOLUME-264". This document which was signed by Mr. Diaz on September 15, 1978, had been prepared by American Honda, and set out American Honda's minimum requirements for capitalization of Cabriolet's business. Planning Volume -- the minimum number of vehicles the dealership was expected to sell in one year -- was 264 Honda automobiles. The required working capital was $79,792 and net worth was required to be $97,364. Various other requirements were made by American Honda fully expected Cabriolet to

strictly adhere to, and to maintain those original capital requirements (Billmyer, Tr. 1126-7).

16. The 264 car planning volume was the same planning volume as De Maria's, under which De Maria was able to get all the cars it needed. (Petrucci, Tr. 63).

17. Mr. Diaz was advised by American Honda during the Summer of 1978 that Cabriolet was to receive at least 264 Honda cars, and that he was to sell at least that many. (Diaz, Tr. 61-62).

18. At the time Carbriolet made its application, it was the responsibility of Mr. Ferens to fill out Dealership Evaluation forms for applicants of dealerships being transferred. (Ferens, Tr. 601). Mr. Ferens met with Mr. Diaz and Mr. Petrucci on July 26, 1978. Despite American Honda's dedualling policy, Ferens testified that he advised against Cabriolet's

immediately building a separate Honda facility (Ferens, Tr. 619), because American Honda recognized a new dealer should not be pushed into doing something he might regret later on, (Ferens, Tr. 622), especially in view of the big expense associated with building a new dealership facility. He said that American Honda wanted to give a new dealer time to get familiar with the product and the company and consider going exclusive in the future, rather than telling him to go exclusive, and bearing that additional added expense initially. (Ferens, Tr. 622); Mr. Diaz responded to Mr. Ferens on July 26, 1978 that "if and when sales increase and the amount of vehicles supplied and sold can support a separate facility, Mr. Diaz will expand." (Ferens, Tr. 608, Exhibit 20 [Emphasis Supplied]). Mr. Diaz also told Mr. Ferens that Mr. Diaz agreed

with him and "plans to keep Honda in the present facility until sales improve to justify a separate location."

19. At the time that Cabriolet applied to succeed De Maria, it was American Honda's understanding that the dealership would stay at the De Maria premises (Madden, Tr. 778) and the Dealer Agreement issued by American Honda reflected this understanding. . (Ex. P-7).

20. During the period between Cabriolet's Application and the issuance of the Dealer Agreement, American Honda had no written system of allocating automobiles (Madden, Tr. 764, 766; Bengston Depo. 4/15/80, at 7; Bowers, Tr. 548; Augustine, Tr. 527) and no method of distribution, written or oral, ever was communicated to Cabriolet by representatives of American Honda, (Diaz, Tr. 53; Petrucci, Tr. 153; Snay, Tr. 316). In fact, Cabriolet had

reason to believe that it would receive at least 264 Hondas per year (Diaz, Tr. 61-62).

21. From July, 1978 to March, 1979 the market in the United States generally and especially in South Florida for the retail sale of Honda Automobiles was very "soft", and the market did not become "hot" until the second Arab Oil embargo in the Spring of 1979 (Petrucci Tr. 157; Diaz, Tr. 71; Snay, Tr. 320, 323; Bowers Tr. 548; Ferens, Tr. 659, 665, 666; Madden, Tr. 818; Augustine, Tr. 524). This period was not a time of "shortage" of Honda cars (Madden, Tr. 818), and was not a time of "restricted supply" (Ex. P-24).

22. The first time that American Honda ever adopted any automobile allocation policy was June 4, 1981, approximately two years after the filing of the

Complaint in this case and about fifteen months after Cabriolet ceased being a dealer (Ex. FJ). Before June 4, 1981, American Honda distributed its cars to dealers pursuant to no standardized method. No two witnesses who testified at the trial on behalf of Plaintiff or Defendant had the same understanding, or were able to similarly describe the workings of a method of allocation of vehicles which American Honda represented to this Court as being "substantially the same" from at least 1977 (Testimony generally; Smoot, Tr. 36). The only ascertainable fact consistently testified to was that American Honda unilaterally and secretly decided not to allocate fifteen percent (15%) of its available product to its dealers pursuant to <u>any</u> method. This 15% withholding of cars was never told to the dealer body, and is not

mentioned in the June 4, 1981 written description. This 15%, representing more than 50,000 cars per year during the period that Cabriolet was a dealer, was distributed solely at the whim or caprice of certain employees of American Honda under the guise of being cars damaged in transit and detained for repairs at their port of entry. (Cardiges, Tr. 507, 510-511; Bengston Depos. 9/20/82, Tr. 80-81).

23. By the Summer of 1978, American Honda had decided to hold out extra cars from the secret 15% pool and to use those cars to pay off Honda dealers who met its demands, gave up dual facilities, and built exclusive Honda facilities. The evidence as to the numbers of cars to be allocated to such dealers conflicted, ranging from zero (Ferens, Tr. 629) to between 150-200% of monthly planning volume (Ex FJ, page 3), to 160% (Ex.

P-32), to 200% of monthly planning volume, (Madden Tr. 783). However, Honda unilaterally reserved the right to renege even if exclusive facilities were built by a dealer, if it decided that the extra cars were not available (Ex. FJ, page 3); Ferens, Tr. 705, 706, (Ex. P-56; Bengston Despos. 9/20/82 Tr. 106-107).

24. Cabriolet commenced its Honda operations, with Honda's approval, during mid-September, 1978 (Petrucci, Tr. 156), although its Dealer Agreement is dated October 13, 1978 (Ex. P-7).

25. In 1978, Cabriolet's receipts of Honda cars consisted of:

September	4	(from De Maria)
September	27	(from American Honda)
October	14	"
November	64	"
December	0	"
	109	

(Ex. P-12; Snay Tr. 363).

Had American Honda distributed cars during late 1978 pursuant to any purported method testified to by anyone at trial, Cabriolet would have received no more than 44 cars during October and November. No witness was able to explain why Cabriolet received 27 cars during September and an additional 78 cars during October and November, 1978.

26. During the period September 16 through December 31, 1978, Cabriolet sold the following numbers of Honda cars:

September	3
October	25
November	16
December	19
	63

Excluding September 1978, (a month in which Cabriolet was in possession of the premises for two weeks but had no Dealer Agreement), Cabriolet sold an average 21 cars per month,' or one car fewer than its monthly Planning Volume, (Ex. P-112), despite there being a "soft" market, and despite the fact that inventory consisted of mostly year-old cars. During the last quarter of 1978 Cabriolet thought 30-35 cars per month would be a better objective for it, but American Honda believed that even at Cabriolet's existing facility,

> ". . . with this kind of availability and more on the horizon, that 65 to 75 units (per month) would be a more realistic im-

mediate objective and one you are capable of achieving." (Ex. P-26) (Emphasis Supplied).

27. Contrary to those American Hondas representations (Ex. P-26) Cabriolet received no cars in December, 1978 and no cars in January, 1979 (Ex. P-112).

28. Except for three months in which new models were introduced (March and April, 1979 - Prelude new model introduction; November, 1979 - 1980 new model year introduction) and were made available to all dealers without regard to "allocations" (Ex. P-3; Diaz, Tr. 70-71), Cabriolet never received its monthly planning volume (22 cars) from American Honda in any month during the period it was a dealer (Ex. P-112).

29. In the 20 months in which Cabriolet was a Honda Dealer, Cabriolet received and sold the following Honda cars:

	Received	Sold
	4 (from De Maria)	
Sep. 1978	27	3
Oct. 1978	14	25
Nov. 1978	64	16
Dec. 1978	--	19
Jan. 1979	--	18
Feb. 1979	9	20
Mar. 1979	36*	24
Apr. 1979	32*	39
May 1979	10	21
Jun. 1979	10	9
Jul. 1979	11	11
Aug. 1979	13	11, 16
Sep. 1979	8	4
Oct. 1979	9	18
Nov. 1979	29*	18
Dec. 1979	12	11
Jan. 1980	15	23
Feb. 1980	7	5
Mar. 1980	18	23
Apr. 1980	18	2
	346	320
May 1980		19, 10
Jun. 1980		1
		345

*New Model intro;
not based on allocation

(Ex. P-112). During the first six months of 1979, FIV ("Sold Out") Dade County dealers registered sales of 1485 Hondas (Petrucci, Tr. 162; Ex. P-27). Cabriolet only received 96 or 97 vehicles from American Honda (Ex. P-27). Thus, at a

time when the overall Dade County Honda dealer body (including Cabriolet) was selling 50 Hondas each month, Cabriolet only received an average of 15 Hondas each month.

30. At all times while Cabriolet was a dealer, American Honda set monthly sales objectives for Cabriolet. American Honda's records demonstrate that Cabriolet attained 100% or more of American Honda's objectives beginning in February, 1979 and during the remainder of its tenure as a dealer except for April, 1979 when Cabriolet attained 96.6% of American Honda's objective (one car short), (Ex. P-29, P-30).

31. American Honda again commissioned J.D. Powers and Associates to prepare an independent Dealer Image Survey report regarding every one of its dealers (Exs. P-8, P-9, P-10). In 1979, Cabriolet

attained the highest score, +583, of any Honda dealer in its district (Ferens, Tr. 740-741). This tally was (i) 152 points higher than the mean score achieved by all other Honda import duals in the United States, and (ii) 40 points higher than the mean score for exclusive Honda dealerships. (Exs. P-8, P-9, P-10). In less than one year as a Honda dealer, Cabriolet had succeeded in reversing the poor image for Honda which had been associated with its predecessor, De Maria. Cabriolet's improved customer image was the result of an affirmative policy not to discount Honda cars (established by Mr. Diaz in September, 1978) but, rather, to use the proceeds of full manufacturer's suggested retail sales price to improve the service made available to Honda customers at 3780 Bird Road. (Diaz, Tr. 68-69).

32. Cabriolet had not been advised by anyone from American Honda in 1978 that if Cabriolet did not push out every Honda car it received, it's future allocations would be reduced. (Diaz, Tr. 70). Nor did anyone, in the early months of 1979, alert Cabriolet to the fact that if Cabriolet didn't "move" more vehicles, subsequent allocations would be diminished. (Ferens, Tr. 661). Nor did Cabriolet report cars as sold which in fact were unsold, as did other dealers (with the knowledge of American Honda) in order to cheat and get more cars (Ex. P-40).

33. By the Spring of 1979, when demand for Hondas greatly exceeded supply, Cabriolet had a backlog of at least 50-60 orders for Honda automobiles and customers were complaining (Diaz Tr. 74-76; Snay Tr. 330-331). Other Miami dealers had plenty of cars (Snay, Tr. 331).

34. Beginning in December 1978, American Honda made a substantial reduction in the number of cars it delivered to Cabriolet (Petrucci, Tr. 161; Diaz, Tr. 78; Snay, Tr. 324; Ex. P-112). In December, 1978, January, 1979 and February, 1979, Cabriolet only received 9 cars but was able to sell out of its "year-old" inventory (Ex. P-112). Mr. Petrucci began complaining to Mr. Madden on a daily basis (Petrucci, Tr. 162) and continued to complain from February until June of 1979 (Petrucci, Tr. 163, 167). Mr. Snay called Mr. Ferens at home on Mondays beginning February, 1979 to complain about the lack of cars (Snay, Tr. 324-325, 343) and Mr. Ferens told him not to worry, that the cars would arrive (Snay, Tr. 324; Diaz, Tr. 76-78). American Honda's only real response to Cabriolet's pleas for cars was that Cabriolet was "stuck" with a low

allocation Cabriolet had unwittingly established in 1978 (Ferens, Tr. 673, 675), and that the only way to increase its allocation was for Cabriolet to separate Honda from its other franchise operations. (Petrucci, Tr. 167; Ferens, Tr. 675, 678, 680; Madden, Tr. 330; Snay, Tr. 330, 333, 335, 340).

35. In March and April, 1979 Cabriolet, like all other United States Honda dealers, received its share (80/20 - Ex. P-3) of the newly introduced 4-door Accords and Prelude Sport Coupes, which cars were distributed based upon Planning Volume, not "allocation" travel rate. Cabriolet sold those cars (Ex. P-112). Despite the "sold out" condition of Cabriolet's inventory beginning in May, 1979 (Ex. P. 129 [100% objective]), Cabriolet received only between 8 and 13 cars

per month until the November, 1979 new model introduction (Ex. P-112).

36. Sometime around March 22, 1979, Mr. Ferens looked over potential sites for exclusive Cabriolet Honda facilities, (Ferens, Tr. 667).

37. In approximately April, 1979, Mr. Petrucci was once again told by Mr. Madden that Cabriolet would get additional automobiles only if it took its Honda operations out of the existing dealership. Mr. Petrucci responded that Mr. Madden would have to show him that Cabriolet really would get more Honda vehicles before he could ask Mr. Diaz to expend additional money for a new facility. (Petrucci, Tr. 166).

38. American Honda refused Cabriolet's request to commit to any specific number of automobiles it would receive in the event that Cabriolet built an exclu-

sive facility (Snay, Tr. 335, 343, 347; Ferens, Tr. 682, 684). Thus, American Honda refused to enter into a "bona fide and good faith negotiation" regarding expansion of the dealer's premises (Ex. P-24, page 3), and, instead, American Honda attempted to coerce Cabriolet to build exclusive facilities upon penalty of not receiving cars.

39. During the period involved in this case, other Florida Honda dealers acceded to American Honda's demands that they change from theretofore approved "dual" to "exclusive" dealerships. Included in this category were Moody Honda in Ft. Lauderdale, Friendly Honda in North Miami, Globe Auto Imports in Clearwater, Southgate Honda in Ft. Myers, Roger Haller Honda in Orlando, the Import Car Store in Melbourne, Honda South in South Miami and perhaps others. (Ferens, Tr. 699-700).

Mr. Ferens was involved in each of these changes (Ferens, Tr. 700).

40. Although Mr. Ferens told other dealers, that they could get an extra allocation of one month's supply of cars by building only a separate showroom (Ferens, Tr. 703-704), Mr. Ferens never made this statement to Cabriolet, because American Honda wanted a full, exclusive dealership from Cabriolet, not just a separate showroom (Ferens, Tr. 680).

41. American Honda utilized its ability to secretly allocate automobiles which dealers did not know existed (15% of all imports) as a weapon against dealers like Cabriolet who refused to expend millions of dollars upon verbal representations regarding receipt of more cars. American Honda's course of conduct is illustrated by its contemporaneous treatment of two Miami competitors of Cabriolet.

42. In 1978, Friendly Ford/Saab/Honda retailed 323 new Hondas at an average profit of $691. In 1979, it sold 399 Hondas at an average profit of $919. (Bower, Tr. 551-552). During 1979, Friendly retailed 526 Hondas at an average profit of $1,319. (Bower, Tr. 552). Prior to 1980, Friendly was a Saab dealer, as well as a Ford and Honda Dealer. Friendly then gave up Ford but still was not treated as a "single point" dealer by American Honda. The "word" from Honda was that it wanted Friendly to become exclusively Honda. American Honda orally represented that additional cars would be given to Friendly if it got rid of Saab, (Bower, Tr. 554-555), and threatened Friendly that "if it didn't get bigger it would get smaller." (Bower, Tr. 571). Shortly thereafter, Saab was no longer located at the Friendly facility (Bower, Tr. 557). In 1981, after

removing Saab and Honda from its premises, Friendly received enough Hondas to retail 538 Hondas at an average profit of $1,078. In 1982, it retailed 433 Hondas at an average profit of $1,088. (Bower, Tr. 558).

43. Ron Esserman is an automobile dealer who owns Honda South on South Dixie Highway, Miami. During 1978 and 1979 Honda South was not an exclusive Honda dealer but, rather, also sold BMW's and Volkswagens (Esserman, Tr. 449). The Honda line had been added to the BMW and Volkswagen order to obtain the Honda line Esserman constructed a separate Honda showroom. Used car service and sale of Honda parts continued alongside the Volkswagen and BMW operations in the main facility. (Esserman, Tr. 452-453). For the seven months in 1978 that it was a dual (triple) dealer, Honda South received

281 cars from American Honda. (Esserman, Tr. 481, ex. P-125). In 1979, Honda South received and sold 690 Hondas at an average profit of $1,161. (Esserman, Tr. 490). Thus, despite selling 100 cars fewer in 1978 than Honda South received from American Honda, that dealership still received almost triple the number of cars in 1979 that it received in 1978. (Esserman, Tr. 490).

44. The distribution to Honda South of at least 690 cars in 1979, despite its sale of only 188 out of 281 Honda cars during 1978 (its first year in business), is inconsistent with any alleged system of allocation testified to by any Honda employee, especially when contrasted with Honda's treatment of Cabriolet during the same time period. Moreover, the threat made to Friendly (about becoming smaller

unless it got bigger) became a reality at Cabriolet (Ex. P-11-2).

45. Simultaneously with American Honda's continuing refusal to provide Cabriolet with a reasonable supply of available vehicles, American Honda representatives repeatedly attempted to coerce Cabriolet into building a new facility. For example, sometime after April, 1979 Mr. Madden visited the Cabriolet facility and met with Mr. Diaz and Mr. Petrucci. Mr. Madden told Mr. Petrucci that American Honda wanted Cabriolet to obtain a lot owned by an Alfa Romeo dealership across the street from Cabriolet, or any other facility, and that when Cabriolet built an exclusive facility for Honda, American Honda would give Cabriolot an additional allocation of 50 cars per month. (Petrucci, Tr. 168; Diaz, Tr. 82). Subsequently, Mr. Madden and Mr. Diaz

discussed the possibility of acquiring the Alfa dealership's lot, and Mr. Diaz advised that it would cost approximately $850,000 to put a sales facility on that lot with service and Honda parts remaining at the existing location. (Diaz, Tr. 85). Mr. Madden still refused to give a written commitment to Mr. Diaz for any additional number of cars if Mr. Diaz authorized this huge expenditure. (Diaz, Tr. 87; Ferens, Tr. 684). Cabriolet did not build the exclusive facility, since the number of cars received each month at that time could not justify Cabriolet paying $20,000 or more a month in mortgage payments to finance a new facility (Diaz, tr. 87).

46. In the Summer of 1979, Mr. Ferens, acknowledging at least to Cabriolet the inequities of the situation, recommended to his Honda superiors that Cabriolet received an increase in cars,

stating, "I feel we should try to increase dealer, if possible, considering." (Emphasis Supplied) (Ferens, Tr. 685, 687, Ex. 57, 14). Mr. Ferens advised either Mr. Diaz or Mr. Petrucci of his recommendations.

47. Approximately July 1, 1979, Mr. Ferens advised Cabriolet that two boatloads of cars were arriving during July, and that Cabriolet would be given approximately 20 to 25 from one shipment and 40 to 45 from the other. (Petrucci, Tr. 169-170; Snay, Tr. 346; Ex. P-90; Ex. P-111). Mr. Ferens also told Cabriolet that since the vehicles were coming in without air conditioners, Cabriolet should "special order" air conditioners immediately and have them in stock, because the extra cars would be there in a few days. (Petrucci, Tr. 175; Snay, Tr. 342-343; Ex. P-111). Cabriolet immediately ordered

and paid for 60 air conditioners at a cost of approximately $25,000.00 (Snay, Tr. 342-343; Davis, Tr. 386-388). However, the vehicles that Mr. Ferens had promised never arrived. (Petrucci, Tr. 176-177; Davis, Tr. 388; Snay, Tr. 346-352). When Cabriolet complained about this breach, American Honda's only response was the by then too familiar refrain that Cabriolet had to go exclusive to get more cars. (Petrucci, Tr. 190-191; Snay, Tr. 350-352). Sale of these promised 60 vehicles would have dramatically increased Cabriolet's future allocations. Such sale would have occurred in the "hot" market.

48. While Mr. Madden professed to Mr. Petrucci that he would discuss the distribution matter with his supervisor, Mr. Billmyer (Petrucci, Tr. 196-197), Mr. Madden disingenously wrote a memorandum to Mr. Billmyer stating that no expansion had

been started, and recommending that American Honda look with favor on a sale of the dealership (Ex. P-63).

49. On July 13, 1979, Mr. Petrucci sent a mailgram to American Honda (Ex. P-27) ordering 200 Honda vehicles. No response ever was received, and the cars were not shipped. (Petrucci, Tr. 196-197).

50. American Honda refused to distribute more cars to Cabriolet because Cabriolet did not build an exclusive facility for Honda as demanded by American Honda, in spite of the fact that Mr. Ferens recommended and promised Cabriolet more cars "considering" (Ex. P-57), and the fact that Madden had authority to ship additional cars to Cabriolet (Ferens, Tr. 682; Schmillen, Depo. 10/28/82, P-36, 63-64). Notwithstanding the fact that Madden, contrary to Vice President

Schmillen, called American Honda's allocation system "inflexible" (Madden, Tr. 833) the record is replete with examples of shipments to competing dealers, including Ron Norris Honda (Ex. P-38; Madden, Tr. 833) and Carey Paul Honda (Ex. P-36; Madden, Tr. 841-848), of vehicles out of the secret 15% reserve which were made at the instance of American Honda employees.

51. No evidence was presented by American Honda to explain why separate, exclusive facilities for Honda operations of a dealer were necessary or desirable in a "hot" market, when all dealers, including Cabriolet, were selling every car they received at full list price and still had a backlog of orders.

52. No evidence was presented by American Honda to explain how any dealer, including Cabriolet, could benefit by

spending millions of dollars for separate, exclusive facilities for Honda in a "hot" market, absent a binding commitment to receive additional vehicles.

53. No evidence was presented by American Honda to demonstrate that the consuming public actually suffered or would have suffered any damage or injury by Cabriolet's failure to build a separate, exclusive facility for American Honda.

55. On October 31, 1979, Cabriolet's Dealer Agreement with American Honda expired by its terms. (Ex. P-7). This Dealer Agreement was the only Dealer Agreement ever issued to Cabriolet by American Honda. (Diaz, Tr. 93-94; Ex. P-82). At no time did American Honda ever take any steps towards formal termination of Cabriolet, nor did American Honda ever notify Cabriolet that Cabriolet was in

breach of any of the terms of its Dealer Agreement. Both Mr. Ferens and Mr. Madden had the responsibility to make recommendations to their superiors concerning renewal of all dealers' Honda Dealer Agreements, (Ex. P-32). Both Mr. Ferens and Mr. Madden, without explanation, failed to recommend renewal of Cabriolet (Ferens, Tr. 582); Madden, Tr. 769; Ex. P-32). Cabriolet's Dealer Agreement never was renewed after it had expired.

56. American Honda's reasons for nonrenewal of Cabriolet's Dealer Agreement were the refusal of Cabriolet to construct a new facility for Honda without an enforceable commitment to receive more cars, and the filing of this lawsuit.

57. In the first quarter of 1980, Mr. Diaz sold the Cabriolet Honda dealership to Norman Braman. Mr. Braman paid the same $400,000 blue sky (Braman, Tr.

405) as Mr. Diaz had paid to Mr. De Maria; however, Mr. Diaz paid a $25,000 sales commission. In addition, Mr. Braman purchased certain physical assets at their actual dollar value, in the sum of approximately $89,000. (Diaz, Tr. 90).

58. The sale of Cabriolet's Honda dealership was a direct result of American Honda's refusal to supply available Honda automobiles to Cabriolet (Diaz, Tr. 80).

59. Mr. Braman met with Mr. Madden prior to signing an agreement with Mr. Diaz to discuss the number of cars that his new dealership would be getting from American Honda. (Braman, Tr. 407). Mr. Braman agreed to build a new facility on Bird Road near the Palmetto Expressway exclusively for Honda. This dealership was built in the latter part of 1980. (Braman, Tr. 414). By letter of intent (never offered to Cabriolet) Braman was

approved by American Honda in April, 1980 at exclusive facilities (Exhibit 39; Braman, Tr. 416). Mr. Braman was allowed to begin selling cars while his new facility was under construction in June, although his dealership did not officially open until completion in the latter part of 1980. (Braman, Tr. 417). During the seven months in 1980 that Mr. Braman was a Honda dealer, Honda delivered 424 vehicles to Braman's new dealership. During 1980, Mr. Braman's first partial year as a dealer, his dealership averaged $1,726 gross profit per new Honda vehicle retailed, and he sold 345 of the 424 Units delivered. (Braman, Tr. 431). Yet, in 1981, American Honda delivered to Mr. Braman 897 units, and in 1982, 1385 units. (Braman, Tr. 426, Exs. p-113, 114, 115, 116, 117, 118). The record does not explain why Braman, who sold 345 out of

424 available Hondas in a runaway market was given double the allocation during the following year. Once again, The 'Braman history is inconsistent with every offered explanation of Honda's purported "inflexible" system.

60. In August, 1980, shortly after Mr. Braman became a dealer and started to receive almost 60 cars per month without a completed facility, Mr. Madden was demoted from his position as Zone Manager, returned to being a district sales manager, inexplicably "resigned" from American Honda on November 15, 1983, but was unemployed until after this trial ended in March, 1984, (Madden, Tr. 755, 756, 763; Braman, Tr. 431).

61. During the time Cabriolet was a Honda dealer, Cabriolet's average gross profit each month from the sale of Honda

Parts and Accessories was $15,000.00 (Davis, Tr. 389, 390; Yesner, Tr. 916).

62. American Honda's purportedly "inflexible" method of distributing vehicles which (i) was unwritten; (ii) was undisclosed to its dealers, including Cabriolet; (iii) was incapable of being fully described in the same manner by any two employees of American Honda; (iv) was easily subverted (as American Honda knew) by dealers who received inside information as to when an allocation was to take place and who registered unsold cars as sold; (v) left the distribution of more than 50,000 vehicles per year to the unchecked whim of lower management personnel; (vi) was not uniformly applied to all dealers but was used to favor certain dealers; and (vii) was used as a weapon to coerce or attempt to coerce certain dealers like Cabriolet into making extra-contractual

concessions, is not a reasonable method of distribution.

63. Commencing in the Spring of 1979, American Honda based its allocations to dealers, including Cabriolet, upon allocations established at a time of non-shortage when American Honda had no contractual right to allocate at all. (Ex. P-7; P-112).

64. By July, 1979, American Honda had decided to force Cabriolet to sell its Honda dealership. Accordingly, American Honda refused to utilize available procedures to give Cabriolet more cars because Cabriolet did not build an exclusive dealership facility. American Honda refused to decrease the minimum capital requirements, (Ex. P-7) and insisted that those minimum capital requirements, which were based upon a 264 car Planning

Volume, continue in effect. (Billmyer, Tr. 1224, 1225; Ex. P-7, Ex. P-24).

65. A representative number of Honda dealers in Miami during the 20 months of Cabriolet's tenure sold 463 more Honda cars than Cabriolet, an average of 23 per month more than the 16 sold by Cabriolet, (Yesner, Tr. 926; Ex. P-27; Bower, Tr. 552 [526 in 1979 = 43.8 per month]; Esserman, Tr. 490 [690 divided by 12 = 57.5 per month]).

66. Cabriolet, like all other Miami Honda dealers, could have sold every Honda car it would have received from American Honda during its tenure as a dealer (because it sold all 1978 inventory when the market got "hot") and through September of 1983 (a 60 month period) since the market has remained "sold out".

67. During Cabriolet's tenure as a Honda dealer, its average gross profit

per new Honda vehicle retailed was $1,038 (Yesner, Tr. 915; Ex. P-138, 139). This average gross profit was substantially lower than the $1642 average gross profit Cabriolet was earning at the end of its tenure & Yesner, Tr. 924), or of the huge profits subsequently earned by Mr. Braman, and was comparable to other Miami Honda dealers previously noted.

68. The average gross profit earned by Cabriolet on Honda parts and accessories during the time Cabriolet was a Honda dealer was $15,000 per month. (Davis, Tr. 388, 389; Yesner, Tr. 916).

69. During its tenure as a Honda dealer, Cabriolet received an average of 16 cars per month, rather than the minimum 1/12 of 264, or 22 cars per month, as provided by its planning volume. (Yesner, Tr. 919; P-7, page 3).

70. Cabriolet was a Honda dealer for twenty months. If Cabriolet was "shorted" only five Hondas per month during this twenty month period, and assuming a 12% interest rate per annum, the present value of Cabriolet's net lost profits on these one hundred cars, based on Cabriolet's actual profit experience, is $328,887. (Yesner, Tr. 921, 950, 951; Ex. P-139).

71. If Cabriolet had remained in business for sixty months, rather than twenty months, and had been "shorted" only five cars per month, and assuming a 12% interest rate per annum, the present value of its net lost profits on these three hundred cars, based on Cabriolet's actual profit experience, is $986,661. (Yesner, Tr. 923; Ex. P-139).

72. During the twenty months of Cabriolet's tenure as a Honda dealer, Cabriolet actually averaged $19,000 per

month net profit from its Honda operations (Diaz, Tr. 113).

73. If Cabriolet had remained in business for sixty months rather than twenty months, Cabriolet's Honda operations would have provided it with an additional net profit of $19,000 per month, or a total net profit of $760,000 on the basis only of 16 Honda cars per month sold, without calculating interest. (Diaz Tr. 113).

74. If Cabriolet had remained in business for sixty months and had received and sold twenty-one cars (16 actually received plus 5 "shorted"), Cabriolet's lost net profit is $1,746,661 ($760,000 + $986,661), without calculating interest. (Yesner, Tr. 923; Ex. P-139; Diaz, Tr. 113).

75. If Cabriolet had been "shorted" twenty cars per month for the twenty

months it was a dealer, a total of 400 cars, based upon its actual profit experience, and assuming 12% interest per annum, the present value of Cabriolet's net lost profits on these 400 cars is $1,315,548. (Yesner, Tr. 928; Ex. P-139).

76. If Cabriolet had been "shorted" twenty cars per month for the sixty months it should have been a dealer, a total of 1200 cars, based upon its actual profit experience, and assuming 12% interest per annum, the present value of Cabriolet's net lost profits on these 1200 cars is $3,946,645. (Yesner, Tr. 929; Ex. P-139).

77. If Cabriolet had remained in business for sixty months and had received and sold thirty-six cars per month (16 actual + 20 "shorted"), Cabriolet's lost net profit is $4,706,645. (3,946.645 plus

760,000). (Fesmer, Tr. 929, Diaz, Tr. 113; Ex. P-139).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this action by virtue of diversity of citizenship and the amount in controversy, and because the Complaint arises under the laws of the United States, under 28 U.S.C. Section 1331 and 1332(a) and 15 U.S.C. Section 1221 et. seq. Jursdiction over the person of all parties has been admitted, and venue in this district is proper under 28 U.S.C. Section 1391(b).

2. Cabriolet is an "automobile dealer" within the meanings of 15 U.S.C. Section 1221(a) and §320.60(11)(a), Florida Statutes.

3. American Honda is an "automobile manufacturer" within the meaning of 15 U.S.C. 1221(a). Sunrise Toyota, Ltd. v.

Toyota Motor Co., 55 F.R.D. 159 (S.D., N.Y., 1972), 1972 CCH Trade Cases ¶74092; Colonial Ford, Inc. v. Ford Motor Co., 592 F.2d 1126 (10th Cir., 1979); Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir., 1979); In Re Frank Meador Buick, Inc., Bkrtcy., 13 B.R. 841 (W.D. Virginia, 1981).

4. American Honda is a "licensee" under §320.60-320.70 Florida Statutes, as a "manufacturer", importer, and distributor.

5. §320.697 Florida Statutes provides, in relevant part:

> "Civil damages. - Any person suffering pecuniary loss because of a violation by a licensee of §§320.60-320.70 notwithstanding the existence of any other remedies ... shall have a cause of action against the licensee for damages, and may recover damages therefor ... in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee ... Upon a prima facie showing by the person bringing the action that such a violation

by the licensee occurred, the burden of proof shall then be upon the licensee to prove that such violation or unfair practice did not occur." (Emphasis supplied).

6. §320.64 Florida Statutes, list the following relevant violations:

"(4) The ... licensee has indulged in any illegal act relating to his business."

"(6) The ... licensee has coerced or attempted to coerce any motor vehicle dealer to enter into any agreement with the licensee."

"(8) The ... licensee has unfairly or without due regard to the equities of a motor vehicle dealer, or without just provocation, ... failed to renew the franchise agreement of such motor vehicle dealer."

7. §320.641 Florida Statutes provides as follows:

§320.641 Unfair cancellation of franchise agreements. -

(1)(a) An applicant or licensee shall notify the motor vehicle dealer and forward a copy of such notice to the department of the licensee's intention to discontinue, cancel, or fail to renew the franchise agreement of any of its motor vehicle dealers

at least 90 days before the effective date thereof, together with the specific grounds for discontinuation, cancellation, or failure to renew of said agreement, if discontinued, canceled, or not renewed.

(b) The failure by the licensee to comply with the 90-day notice period and procedure prescribed herein shall render voidable, at the option of the motor vehicle dealer, any discontinuation, cancellation or nonrenewal of any franchise agreement. Designation of a franchise agreement at a specific location as a "nondesignated point" shall be deemed an evasion of this section and shall constitute an unfair cancellation.

(2) Franchise agreements are deemed to be continuing unless the applicant or licensee has notified the department of the discontinuation of, cancellation of, or failure to renew the agreement of any of its motor vehicle dealers, and annual renewal of the license provided for under ss. 320-60-320.70 is not necessary for any cause of action against the licensee.

(3) Any motor vehicle dealer whose franchise agreement is discontinued, canceled, or not renewed may, within such 90-day notice period, file with the department a verified complaint in triplicate for a determination of unfair discontinuation or cancellation. Agreements and certificates of appointment shall continue in effect until final determination by the department of the issues raised in such

complaint by the motor vehicle dealer, and no replacement motor vehicle dealer shall be named for this point or location to engage in business prior to the final adjudication by the department on the discontinuation, cancellation, or failure to renew.

(4) Notwithstanding any other provisions of this section, the failure of a motor vehicle dealer to be engaged in business with the public for 10 consecutive business days shall constitute abandonment by the dealer of his franchise agreement. If any motor vehicle dealer abandons his franchise agreement, he shall have no cause of action under this section. However, it shall not be considered abandonment if such failure to engage in business is due to an act of God, a work stoppage, or a delay due to a strike or labor difficulty, a freight embargo, or other cause over which the motor vehicle dealer has no control, including any violation of ss 320.60-320.70.

(5) If said complainant motor vehicle dealer prevails, he shall have a cause of action against the defendant for reasonable attorneys' fees and costs incurred by him in such proceeding for unfair discontinuation, cancellation, or failure to renew, pursuant to this section. (Emphasis supplied).

8. Having survived American Honda's Motion to Dismiss the Amended Complaint,

Cabriolet established a prima facie case, that American Honda violated Sections 320.64(4), (6), (7) and (8) and §320.641 Florida Statutes, by (a) indulging in illegal acts; (b) coercing or attempting to coerce Cabriolet to agree to build a new facility; and (c) failing to renew Cabriolet's Dealer Agreement.

9. Cabriolet also established a prima facie case that American Honda's discrimination against Cabriolet in the allocation and distribution of vehicles amounted at a minimum, to a de facto "termination" or "discontinuance" of Cabriolet's Dealer Agreement, in violation of the provisions of Chapter 320.641, Florida Statutes.

10. When Cabriolet established its prima facie case that violations of these Florida Statutes by American Honda had occurred, the burden of proof shifted to

American Honda to prove that the violations actually had not occurred. See, Section 320.697, Florida Statutes. American Honda has failed to sustain its burden of proof by a preponderance of the evidence.

11. The Court concludes as a matter of law that American Honda breached its Dealer Agreement with Cabriolet:

(a) by failing and refusing "to assist" Cabriolet in its operation relating to the resale of ... Honda Automobiles when American Honda deliberately and for its own purposes refused to deliver available Honda Automobiles to Cabriolet for resale to customers because Cabriolet did not erect separate exclusive facilities for its Honda operations (Article II, Section 1, Page 1); and

(b) by establishing an allocation rate ("rate of travel") for Cabriolet

at a time when no shortage of cars existed and when American Honda had no legal right to allocate (Article VII, Section 2, Page 10); and

(c) by then applying the said unlawfully established allocation rate to a period of shortage and refusing to modify or alter that allocation rate, thereby making American Honda's "Manner" of allocation as applied to Cabriolet "unreasonable" (Article VII, Section 2, Page 10); and

(d) by refusing to enter into "good faith negotiation to determine the extent of improvement necessary to fulfill the requirements of ... expansion of business." (Article III, Section 3, Page 3); and

(e) by implementing and refusing to modify an "unreasonable" method of

distributing automobiles to its dealers, including Cabriolet (Article VII, Section 2, Page 10); and

(f) by requiring Cabriolet to maintain excessive capital in its Honda operations (Article III, Section 7, Page 4); and

(g) by failing to deliver at least 264 cars per year to Cabriolet (Ex. P-7, Page 3).

12. American Honda breached its contract with Cabriolet in failing to perform its implied condition of cooperation when, for its own extra-contractual purposes it failed to provide vehicles (Commercial Contractors, Inc. v. U.S. Fidelity and Guaranty Co., 524 F.2d 944 (5th Cir. 1975) (implied condition of cooperation and good faith between contracting parties) when procedures were available to grant relief even under the

terms of its purported system of allocation.

13. The aforesaid breaches of the Dealer Agreement, together with a violation of the Federal Dealer Day in Court Act also constitute the "indulg-[ing]" ... by a "licensee" of an "illegal act relating to his business" in violation of §320.64(4) Florida Statutes.

14. American Honda breached an oral contract during July, 1979 with Cabriolet when it agreed to provide Cabriolet with at least 60 additional cars, required Cabriolet to purchase 60 kits of air conditioners for these cars, and failed to deliver the vehicles. In addition, this specific willful refusal to deliver cars to Cabriolet constituted an act of illegal "coercion" under the Federal Dealer's Day in Court Act.

15. American Honda unlawfully effectively "discontinued" Cabriolet's Dealer Agreement by refusing to provide available cars to Cabriolet in violation of §320.641 Florida Statutes.

16. American Honda violated Sections 320.64(7) and (8), and §320.641 Florida Statutes by failing to renew Cabriolet's Dealer Agreement upon its expiration on October 31, 1979.

17. The issue of "bad faith" under the Federal Dealer's Day in Court Act, 15 U.S.C. Section 1221 et. seq., involves a determination of American Honda's intentions as manifested by its actions. Shor-Line Rambler, Inc. v. American Motor Sales Corp., 543 F.2d 601 (7th Cir. 1976). American Honda violated both the Federal Automobile Dealer's Day in Court Act and Section 320.64(6), Florida Statutes, by unlawfully and in breach of the Dealer

Agreement demanding that Cabriolet build an unnecessary, unreasonable, expensive new dealership facility and by enforcing such unlawful demands with sanctions (no cars, non-renewal and continued high capital requirements) and the threat that such sanctions would continue; and coercing Cabriolet to sell its Honda dealership. Shor-Line Rambler, supra; Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A., 533 F.2d 510 (10th Cir., 1976); David McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir., 1974, cert. denied 420 U.S. 992 (1975).

18. Section 320.64(6) and (7) Florida Statutes are violated by a showing that a licensee coerced or attempted to coerce a dealer to "enter into any agreement" with the licensee. That the coercion did not succeed, therefore, does not obviate the

attempt, or the violation of the law. American Honda attempted to coerce Cabriolet to build a new exclusive facility for Honda Operations in consideration for which construction American Honda would increase Cabriolet's allocation. Any characterization of American Honda's actions as merely a "request" rather than coercion is negated by the sanctions applied, to wit, refusal to provide more cars when the purported "system" of distribution contained available procedures to provide vehicles, by knowingly allowing other dealers to subvert the "system", by failing to provide vehicles even when, at the inducement and promise of American Honda's representatives, Cabriolet purchased air conditioners, and by favoring other dealers.

19. Cabriolet would not have sold its Honda operations but for the relentless, unlawful pressure, i.e. coercion, of American Honda that Cabriolet build a new, exclusive Honda facility, and the sanctions (refusal to provide cars) employed.

20. It is reasonable to conclude in view of §320.641, Florida Statutes, that Cabriolet would have remained a Honda dealer for at least five years, and that Cabriolet could have operated at least as well during a continuously "hot" period as its Miami competitors.

21. Lost profits for five years is a reasonable measure of damages, in this case especially since damages need not be ascertainable with an absolute degree of certainty and since American Honda is estopped to use its actions (establishing an illegal and low allocation and coercing

Cabriolet to sell its dealership) to minimize the damages.

22. Cabriolet's unrebutted testimony on damages it has suffered was not unreasonable as a matter of law in light of the profits testified to by other dealers and the evidence of Cabriolet's actual profit history.

23. Cabriolet also is entitled to an award of attorneys' fees herein pursuant to the Federal Automobile Dealer's Day in Court Act, and 320.697 Florida Statutes.

24. Assuming a method of American Honda's allocation and distribution existed between September 1978 and March 1980, such method was unlawful both per se and as applied to Cabriolet, and was used as an implement of unlawful coercion in violation of the Federal Dealer's Day in Court Act and Florida Statutes 320.60-320.70.

25. As a direct and proximate result of Honda's breaches of contract, and breaches and violations of each of the statutes referenced above, Cabriolet has suffered damages in the amount of $4,706,645.00.

26. The Court will convene a Hearing at the earliest practical time to ascertain the amount of attorneys fees and costs to be added to the judgment referenced above.

Any findings of fact which should properly be deemed conclusions of law are hereby adopted as such.

DONE AND ORDERED in Chambers this 5th day of July, 1984.

/s/
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Paul Marcus, Esquire
Michael Rosenberg, Esquire
Bennett Falk, Esquire
Roland N. Smoot, Esquire
J. Donald McCarthy, Esquire
Stanley J. Krieger, Esquire

UNITED STATES COURT OF APPEALS
for the Eleventh Circuit

No. 84-5698

D.C. Docket No. 79-3409

CABRIOLET PORSCHE AUDI, INC.,
A FLORIDA CORPORATION d/b/a
CABRIOLET HONDA CAR,
Plaintiff-Appellee,
Cross-Appellant,

versus

AMERICAN HONDA MOTOR CO., INC.,
A CALIFORNIA CORPORATION,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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Before HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Entered: October 15, 1985
For the Court: Spencer D. Mercer, Clerk
By: /s/ _____
Deputy Clerk

ISSUED AS MANDATE: Nov. 6, 1985

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that plaintiff-appellee/cross-appellant pay to defendant-appellant/cross-appellee, the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES DISTRICT COURT
for the
Southern District of Florida

Case No. 79-3409-CIV-ALH

ORDER REDESIGNATING FINAL JUDGMENT AND AMENDED FINAL FACT AND CONCLUSIONS OF LAW AND AMENDED FINDINGS OF ACT AND CONCLUSIONS OF LAW

Filed 7-31-84

CABRIOLET PORSCHE AUDI, INC.,
a Florida corporation, d/b/a
Cabriolet Honda Car,
Plaintiff,
vs.

AMERICAN HONDA MOTOR CO., INC.,
a California corporation,
Defendant.

THIS COURT has made an independent review of the record in this cause and, pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure, it is hereby,

ORDERED AND ADJUDGED, that the Final Judgment dated June 18, 1984 and the Amended Final Judgment dated July 5, 1984, are redesignated as the Findings of Fact

and Conclusions of Law and Amended Findings of Fact and Conclusions of Law, respectively.

DONE AND ORDERED, this 20 day of July 1984, at Miami, Florida.

Copies to:
Paul Marcus, Esq.
Michael Rosenberg, Esq.
Bennett Falk, Esq.
Roland N. Smoot, Esq.
J. Donald McCarthy, Esq.
Stanley J. Krieger, Esq.

/s/
ALCEE L. HASTINGS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
for the
Southern District of Florida

Case No. 79-3409-CIV-ALH

FINAL JUDGMENT
Filed 7-31-84
Robert M. March
Clerk
U.S. Dist. Court
S.D.of Fla.Miami

CABRIOLET PORSCHE AUDI, INC.,
a Florida corporation, d/b/a/
Cabriolet Honda Car,
Plaintiff,

vs.

AMERICAN HONDA MOTOR CO., INC.,
a California corporation
Defendant.

THIS CAUSE came on for non-jury trial on the 12th day of March, 1984 and, based upon the Amended Findings of Fact and Conclusions of Law as determined by the Court, it is

ORDERED, ADJUDGED, AND DECREED, THAT:

1. Plaintiff, CABRIOLET PORSCHE AUDI, INC., a Florida corporation, d/b/a Cabriolet Honda Car, shall have and recover of

and from the Defendant, AMERICAN HONDA MOTOR CO., INC., a California corporation, the sum of $4,706,645.00, for which sum let execution issue.

2. This Court expressly reserves jurisdiction for the purposes of taxing attorneys fees and costs herein.

DONE AND ORDERED, at Miami, Florida this 20 day of July, 1984.

Copies to:
Paul Marcus, Esq.
Michael Rosenberg, Esq.
Bennett Falk, Esq.
Roland N. Smoot, Esq.
J. Donald McCarthy, Esq.
Stanley J. Krieger, Esq.

/s/_____
ALCEE L. HASTINGS
UNITED STATES
DISTRICT JUDGE

STATUTORY PROVISIONS

Title 15. United States Code

Chapter 27. Automobile Dealer Suits Against Manufacturers

Sec.
1221. Definitions.
1222. Authorization of suits against manufacturers; amount of recovery; defenses.
1223. Limitations.
1224. Antitrust laws as affected.
1225. State laws as affected.

§ 1221. Definitions

As used in this chapter--

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and

any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

(Aug. 8, 1956, c. 1038, § 1, 70 Stat.1125.)

§ 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the

United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. (Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125.)

* * *

§ 1223. Limitations

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued.

(Aug. 8, 1956, c. 1038, § 3, 70 Stat. 1125.)

§ 1224. Antitrust laws as affected

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

(Aug. 8, 1956, c. 1038, § 4, 70 Stat. 1125.)

§ 1225. State laws as affected

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.

(Aug. 8, 1956, c. 1038, § 5, 70 Stat. 1126.)

Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact [whether based on oral or documentary evidence]* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be

considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

*Bracketed portion added by amendment effective August 1, 1985.

85-1447

No. 85-(3)

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CABRIOLET PORSCHE + AUDI, INC.,
Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LYON & LYON
A Partnership Including
Roland N. Smoot
A Professional Corporation
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Attorney for American Honda Motor Co., Inc.

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BRIEF OF
AMERICAN HONDA MOTOR COMPANY, INC.*
IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner, Cabriolet Porsche Audi, Inc., has asked this Court to review a judgment of the Eleventh Circuit Court of Appeals vacating an award to it of approximately five million dollars. It has presented as questions for review propositions which, while perhaps appealingly phrased, have little relation to either the impact of the Eleventh Circuit's judgment on automobile dealers or the actual nature of that Court's review of the district court's findings. Further, those questions present to this Court no issue which, under Rule 17 of the Court's Rules, are considerations which govern review on certiorari.

---

* American Honda is a wholly owned subsidiary of Honda Motor Co., Ltd. and is partial owner of Honda of America Mfg., Inc.

STATEMENT OF THE CASE

There is little in Petitioner's Statement of the Case that reflects the record made in the trial court. It is, however, unnecessary to turn to that record or to rebut the rhetoric upon which the assertions of error are predicated. It is sufficient to note that this was, indeed, as set forth in Cabriolet's petition, an action by an automobile dealer against a distributor in the United States of automobiles made by Honda Motor Company, Inc. The gravamen of that action, as noted by Judge Hill, writing for the Circuit Court, was Cabriolet's claim that American Honda's failure to give it all the cars it requested amounted to breaches of the agreement between dealer and distributor and violations of state and federal law. (Petitioner's Appendix, p. 16.)

The case was tried before Judge Hastings in March 1984 and on July 31, 1984, he entered judgment awarding to Cabriolet $4,760,645.00 plus an undetermined amount of attorney's fees. That judgment was predicated on findings of fact prepared by Cabriolet's counsel. In its petition (p. 7), Cabriolet represents to this Court that " . . . . the district court significantly revised the dealer's proposed findings and conclusions and adopted them as its own." Cabriolet is being less than candid. As Judge Hill noted:

> "It is clear that the district court judge adopted virtually verbatim the proposed findings of fact and conclusions of law tendered by appellee/defendant [sic]."[1/] (Appendix, p. 3.)

1/ Judge Hill, as the opinion makes clear, meant to say "appellee/plaintiff".

Despite the parentage of the findings of fact, and consistent with the standards set forth in Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), the Circuit Court based its judgment on its "review of the court's findings and legal conclusions against the record and the case and statutory law, which reveals many of the relevant findings to be clearly erroneous and the legal conclusions to be incorrect." (Appendix, p. 3, fn. 2.)

Cabriolet bottoms its petition on nothing more than the argument that a Court of Appeals is bound, under Rule 52 of the Federal Rules of Civil Procedure, by the findings of the trial court "based upon conflicting testimony." (Petn., p. 45.) Indeed, it asserts that it has found no decision in which a Court of Appeals "had ruled that determinations made by a district

court based upon (such) conflicting testimony were clearly erroneous . . . ." (Petn., p. 45.) We frankly do not know to what Cabriolet refers.

If it believes that this is the first appellate decision wherein a judgment based on a finding of coercion or bad faith under the Dealers' Day in Court Act, 15 U.S.C. Sections 1221 et seq., was reversed, it errs as a matter of fact. We refer Cabriolet to such cases as Garvin v. American Motor Sales Corp., 318 F.2d 518 (3d Cir. 1963), Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964), and Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir.) cert. denied 436 U.S. 946 (1978), the last being cited by Cabriolet in its petition. In each, a judgment entered

in favor of an auto dealer under that Act, based on such findings, was reversed. In Globe, particularly, the Court of Appeals noted the "sharp conflict in the testimony as to the nature of the incidents and the circumstances surrounding them" (328 F.2d at 648).

If it believes that an appellate court must, under Rule 52, sustain a finding of a district court if there is any evidence to support that finding, it errs as a matter of law. As this Court said in United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948):

> " . . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Our emphasis)

The Court of Appeals here reversed the district court because it found the material factual findings upon which the judgment was based were clearly erroneous when tested by the standards required by Anderson v. City of Bessemer City, supra. (See Appendix, pps. 19-22, 40.) Further, the Court of Appeals' construction of the Dealers' Day in Court Act is consistent with all the authorities of which we have knowledge and Cabriolet has cited no Florida decision construing the Florida statutes involved in a manner inconsistent with that here applied. This petition, therefore, presents to this Court no conflict of decisions, state or federal, and no actual departure from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

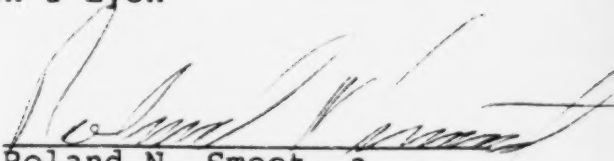
Neither does that decision raise an important question of federal, or indeed state, law which has not been, but should be, settled by this Court. Cabriolet is only dissatisfied that the substantial judgment it obtained from Judge Hastings was vacated on appeal. Its rhetoric to the contrary notwithstanding, the judgment of the appellate court affects only the parties to that judgment and makes no change either in the manner in which the Dealers' Day in Court Act has been construed since its enactment or in the standard of review under Rule 52.

We urge that the Court of Appeals did nothing more than exercise its appellate function in determining that Cabriolet's judgment was improvidently entered. We are content to rely upon its opinion as American

Honda's best advocate in opposing this petition.

Respectfully submitted,

Lyon & Lyon

By 

Roland N. Smoot, a
professional corporation
Attorneys for Respondent

AFFIDAVIT OF SERVICE

On March 28, 1986, I served the foregoing document described as Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on Paul Marcus, Esq. by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully paid in the United States mail at Los Angeles, California, addressed as follows:

9200 South Dadeland Boulevard
Suite 520
Miami, Florida 33156

I declare under penalty of perjury that the above is true and correct.

Ramsey Al-Salam

Ramsey M. Al-Salam

Supreme Court, U.S.
FILED
APR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1447

IN THE

OCTOBER TERM, 1985

CABRIOLET PORSCHE + AUDI, INC.
Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY

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Counsel of Record

Attorney for Cabriolet Porsche + Audi, Inc.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

CABRIOLET PORSCHE+AUDI, INC.,
a Florida Corporation,
d/b/a CABRIOLET HONDA CAR,

Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
a California Corporation,

Respondent.

PETITIONER'S REPLY

Respondent's Brief in Opposition merely confirms the need for review in this case. This reply is submitted to demonstrate that the arguments it proffers reinforce the conclusion that this case should be reviewed by this Court.

1. Respondent's statement of the case relies upon the findings of fact made by the court of appeals (Br. Op. 2, 3, 4). The central issue in this case is whether the evi-

dence below justified the appellate court's substitution of its findings for those made by the district court which heard and considered the testimony and the other evidence. Respondent makes no attempt to rebut petitioner's statement of the facts shown by that evidence; instead it is "content to rely upon its [the court of appeals] opinion as American Honda's response" (Br. Op. 8-9). If respondent's argument is adequate, then courts of appeals can effectively preclude review by appropriately reciting the litany prescribed by this Court in Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985). That is precisely what petitioner suggested the court of appeals did in this case (Pet. 34-36, 60-64). That, petitioner suggests, makes it necessary that this Court exercise its supervisory jurisdiction to compare the record and the findings made by the district court with those made by the court of appeals to assure that Anderson is not being so simply evaded.

2. As respondent emphasizes, the court of appeals adhered to its 1975 precedent condemning the practice of district judges who adapt the district court's findings of fact and conclusions of law directly from those proposed by the parties. Br. Op. 3; App. 3 n.2. The court of appeals reaffirmed that precedent, even though it was clear that the district court had critically examined detailed proposed findings and conclusions submitted by each of the parties and had revised petitioner's proposed findings and conclusions in a manner that reduced the award by more than nine million dollars. That court reaffirmed its 1975 precedent in the face of this Court's 1985 decision directly condemning similar precedents in the Fourth Circuit. Anderson, 105 S.Ct. at 1510-11.

The fact that the court below explicitly continued its policy of condemning the use of proposed findings submitted by the parties requires review by this Court. Neither the

bar nor the district courts should be left in doubt about the propriety of this practice. In those districts that must deal with overwhelming caseloads and dockets, the practice is often perceived by district court judges as a necessity. If parties whose counsel seek to aid those courts by submitting detailed and fully supported proposed findings and conclusions may be penalized for their counsels' efforts on appeal, this Court should so declare in order that the practice may be eliminated or revised. On the other hand, if the need to manage heavy criminal and civil dockets in the district courts justify reliance upon this practice, this Court should make it clear that the practice and its products are to be accepted by the courts of appeals absent clear evidence of abuse.

3. Respondent confuses the distinction between those cases in which an appellate court reverses because the evidence is insufficient and those in which it reverses be-

cause the district court's findings, although supported by sufficient evidence, are found to be clearly erroneous or against the manifest weight of the evidence. Each of the decisions proffered by respondent involved a reversal based upon the appellate court's determination that the evidence was insufficient to support the trial court's findings. Br. Op. 5 and cases cited there. In the present case, the court of appeals did not question the sufficiency of the evidence; it chose instead to substitute its inferences for those drawn by the district court. The present case provides the Court with a needed opportunity to clarify the distinction and its application in civil appeals.

In Florida v. Tibbs, 457 U.S. 31 (1982), the Court found the distinction to be controlling for double jeopardy purposes in criminal cases. A defendant whose conviction is reversed on the ground that it was against the manifest weight of the evidence

may be tried; a defendant whose conviction is reversed on the ground that the evidence was insufficient may not.

The Court did not attempt to fully develop the distinction in Tibbs. 457 U.S. at 44-45; see also, id. at 51 (White, J., dissenting); see also, e.g., Comment, The Sufficiency-Weight Distinction -- A Matter of Life and Death, 38 U. Miami L. Rev. 147 (1983) (commenting on Tibbs and reviewing historical and contemporary meanings of the distinction). It was, of course, unnecessary for the Court to discuss the application or significance of that distinction in civil cases. The decision below illustrates the need and provides an appropriate opportunity for this Court to clarify the distinction and its application in civil appeals.

The distinction is specially important in the context of the questions presented here. The decision below represents a departure from settled jurisprudence established under

the federal Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-1225 (1982), Pet. 43-46, as well as a departure from the standard applied in Anderson. The consequences to the proper administration of the Act that flow from that departure provide additional reasons why the Court should grant review here. Pet. at 37-60. Neither respondent nor the court of appeals has addressed these consequences. This Court should.

4. Respondent has not attempted to rebut or substantially address the concerns raised by the decision below and the questions presented here. Instead, it has relied upon misstatements of petitioner's position in the district court (e.g., Br. Op. at 2) and petitioner's arguments here (e.g., id. at 4-6). Those concerns are matters of great consequence to an important sector of the Nation's economy, the distribution of automobiles, and to the economy of one of the Nation's important institutions, the federal

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courts. Respondent's silence on those issues merely emphasizes the need for review here.

Accordingly, petitioner submits that the court should grant the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul Marcus, an attorney for petitioner, certify that three copies of petitioner's Reply to Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis were deposited in a United States Postal Service Express mail envelope addressed to Roland N. Smoot, Clyon & Clyon, 201 West Sixth Street, 34th Floor, Los Angeles, California 90017, and deposited with first-class postage had been evidence that first-class postage had been paid thereon on April 12, 1982.